IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-212

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA,
Appellant,

vs.

DONNY BRURELL BUCKLEY AND ALYCIA MARQUESE BUCKLEY, BY THEIR PARENT AND NEXT FRIEND, RUBY L. BUCKLEY, ON BEHALF OF THEMSELVES AND ALL NEGRO SCHOOL AGE CHILDREN RESIDING IN THE AREA SERVED BY THE ORIGINAL DEFENDANTS; UNITED STATES OF AMERICA; THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; AND SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JURISDICTIONAL STATEMENT.

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APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the United States Court of Appeals for the Seventh Circuit, which held that Chapters 52, 173 and 239 of the 1969 Acts of the Indiana General Assembly were "a substantial cause of interdistrict segregation" and a violation of the Equal Protection Clause of the Fourteenth Amendment. This statement is submitted by appellant to show that the Supreme Court of the United States has jurisdiction on an appeal to review the final judgment in question and should exercise such jurisdiction in this case.

OPINIONS BELOW.

The majority and dissenting opinions in the United States Court of Appeals for the Seventh Circuit and the opinion and judgment of the United States District Court for the Southern District of Indiana are not yet reported. Copies of said opinions and judgment are set forth in Appendix A hereto.

JURISDICTION.

The action in the district court, filed on May 31, 1968, was originally brought by appellee United States of America pursuant to Sections 407(a) and (b) of the Civil Rights Act of 1964, 42 U. S. C. § 2000c—6(a) and (b), against appellee The Board of School Commissioners of the City of Indianapolis, Indiana, to desegregate the Indianapolis Public Schools (hereinafter called "IPS"). After holding on August 18, 1971, that IPS was unlawfully segregated, the district court directed that other school corporations located within Marion County and the Indianapolis metropolitan area, including appellant, be joined as additional defendants so that the possibility of an

interdistrict remedy could be explored. On September 14, 1971, the district court allowed appellees Donny Brurell Buckley and Alycia Marquese Buckley to intervene as plaintiffs representing a class of school-age Negro children and to file a complaint seeking interdistrict relief against appellant and the other added defendant school corporations. Jurisdiction was based upon 42 U. S. C. § 1983 and 28 U. S. C. § 1343(3).

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Seventh Circuit on July 16, 1976. No petition for rehearing was filed. A notice of appeal to this Court was filed in the United States Court of Appeals for the Seventh Circuit on July 26, 1976. A copy of said judgment of the court of appeals is set forth in Appendix B hereto, and a copy of said notice of appeal is set forth in Appendix C hereto.

The jurisdiction of the Supreme Court of the United States over this appeal is conferred by 28 U. S. C. § 1254(2).

Cases believed to sustain the jurisdiction of this Court to review by appeal the decision of the court of appeals are *Dutton* v. *Evans*, 400 U. S. 74 (1970); *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U. S. 134 (1962); *Detroit* v. *Murray Corporation*, 355 U. S. 489 (1958); and *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66 (1954).

The statutes of the State of Indiana whose validity is involved are Acts 1961, Chapter 186, pages 431 to 442; Acts 1969, Chapter 52, pages 57-58; Acts 1969, Chapter 173, pages 357-359, 372-373; and Acts 1969, Chapter 239, pages 894, 904-911. The said statutes are set forth in Appendix D hereto.

QUESTION PRESENTED.

Whether the United States Court of Appeals for the Seventh Circuit erred in holding that Indiana Acts of 1969, Chapter 173, which expanded the Indianapolis civil governmental boundaries without a similar expansion of the school district boundaries

of IPS, when considered in conjunction with Indiana Acts of 1969, Chapters 52 and 239, was "a substantial cause of inter-district segregation" (*Milliken* v. *Bradley*, 418 U. S. 717, 745 (1974)), and a violation of the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE.

The action originally brought by appellee United States of America against appellee The Board of School Commissioners of the City of Indianapolis, Indiana, resulted in a decision by the district court on August 18, 1971, that IPS was unlawfully segregated. *United States* v. *Board of School Commissioners of the City of the City of Indianapolis, Indiana*, 332 F. Supp. 655 (S. D. Ind. 1971), *affirmed* 474 F. 2d 81 (7th Cir. 1973), *cert. denied*, 413 U. S. 920 (1973).

In its opinion of August 18, 1971, the district court commented on the change in the racial characteristics of IPS over the years, with the number of blacks increasing and the number of whites decreasing. It noted that when the percentage of black pupils in a given school approaches a certain point, the white exodus becomes accelerated and resegregation rapidly occurs. After stating "that something more than a routine, computerized approach to the problem of desegregation is required of this court, lest the tipping point be reached and passed beyond retrieve", it went on to say:

> "Realistically, it is clear that the tipping point/resegregation problem would pale into insignificance if the Board's jurisdiction were coterminous with that of Uni-Gov. It would be minimized still further if extended to Lawrence, Beech Grove and Speedway City, and to certain parts of the adjoining counties practically indistinguishable from the City of Indianapolis, such as the Carmel area of Hamilton County and the Greenwood area of Johnson County. Certain legal questions immediately spring to mind which cannot, or at least should not be answered without the joinder of additional parties to this action.

> "Some of the questions are as follows:
>
> "1. Are Chapter 186 of the Acts of 1961, Chapter 52 of the Acts of 1969, and Chapter 173 of the Acts of 1969 [the Uni-Gov Act], or any of them, unconstitutional as tending to cause segregation or to inhibit desegregation of the Indianapolis School System?
>
> "2. If the answer to Question 1 is in the affirmative, did passage of the Uni-Gov Act automatically extend the boundaries of the School City coterminous with the boundaries of the Civil City, as provided generally by Indiana law?
>
> "3. If both of the foregoing questions are answered in the affirmative, are Lawrence, Beech Grove, and Speedway City presently under the jurisdiction of the defendant Board, or does Uni-Gov merely have the effect of annexing the eight township school corporations?" (332 F. Supp. at 679)

On September 7, 1971, appellee United States of America moved to add certain additional school corporations as parties defendant, including appellant, but it failed to file any pleading asserting any claim for relief against such added defendants. Thereafter, on September 14, 1971, the district court allowed appellees Donny Brurell Buckley and Alycia Marquese Buckley to intervene as plaintiffs representing a class of school-age Negro children and to file a complaint seeking relief against the added defendant school corporations.

On October 21, 1971, appellees Buckley filed an amended complaint in which they named as defendants the original defendants in the action commenced by appellee United States of America as well as the Governor, the Attorney General and the Superintendent of Public Instruction of the State of Indiana, the Indiana State Board of Education and nineteen suburban school corporations, including appellant, as added defendants. Paragraph 9 of the amended complaint alleged:

> "9. By their present method of maintaining and operating separate school corporations, the defendants have

effected racial segregation and discrimination in the operation of public schools and school systems serving Marion County, Indiana, and the Indianapolis metropolitan area, in violation of the rights secured to plaintiff-intervenors by the Fourteenth Amendment to the Constitution of the United States and Article VIII, Section 1, of the Constitution of Indiana."

Since The School Corporation Reorganization Act of 1959, IC, 20-4-1, pursuant to which all of the defendant school corporations were created and their boundaries fixed, was not mentioned in the amended complaint, appellant propounded interrogatories to appellees Buckley concerning what was intended by the allegations of paragraph 9 of their amended complaint. In their answers to the said interrogatories, appellees Buckley conceded that the amended complaint makes no attack on the constitutionality of the statute under which the defendant school corporations were created and no attack on the validity of the proceedings by which the defendant school corporations were created under such statute. Appellees Buckley stated that they "contend there has been unjustified maintenance of school district boundaries in light of increasing racial isolation in respective districts and increasing inequality in opportunities presented."

In paragraph 10 of their amended complaint, appellees Buckley framed the issues posed by the three questions of the district court as follows:

"10. Section 314 of Chapter 173 of 1969, Burns Ind. Stat. Ann. § 48-9213 (1970 Cum. Supp.), which chapter is known as the 'Consolidated First Class Cities and Counties Act' is unconstitutional and void insofar as it purports to exempt from the scope and effect of said act the consolidation of all school corporations within Marion County, Indiana. The purpose and effect of such exemption, as further implemented and enabled by the provisions of Chapter 186 of the Acts of 1961, Burns Ind. Stat. Ann. § 28-2338 to 28-2347 (1968 Cum. Supp.) and Chapter 52 of the Acts of 1969, Burns Ind. Stat. Ann. § 28-2346a

(1970 Cum. Supp.) have been and are to perpetuate segregation on the basis of race and to inhibit desegregation in the public schools and school systems of Marion County."

The case was tried in the district court in June and July, 1973, on the issues formed on the amended complaint of appellees Buckley and the answers thereto. The constitutionality of the statutes attacked in paragraph 10 of the amended complaint was in issue at that trial, and evidence on the issue was received. On July 20, 1973, the district court filed its memorandum of decision and, relying on *Bradley* v. *Milliken*, 484 F. 2d 215 (6th Cir. 1973), ordered an interdistrict remedy on grounds other than the alleged unconstitutionality of the statutes attacked in paragraph 10 of the amended complaint. 368 F. Supp. 1191. The district court stated that, "in view of the court's other findings and conclusions, it is unnecessary to consider the question of unconstitutionality." *Ibid.*, at 1208.

An appeal was taken from said judgment to the United States Court of Appeals for the Seventh Circuit, which was decided on August 21, 1974. 503 F. 2d 68. With respect to the interdistrict remedy ordered by the district court, the court of appeals held:

"In accordance with Milliken v. Bradley, 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974), we reverse the district court's findings, conclusions, orders and rulings insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries; insofar as they pertain to a remedy within the boundaries of Uni-Gov, we vacate those rulings and remand for further proceedings consistent with that decision. The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken*." (Footnotes omitted) (503 F. 2d at 86)

Following remand, the case was tried in March, 1975, in the district court, and on August 1, 1975, the district court filed

its memorandum of decision. (Appendix A) On the Uni-Gov issue, the court held:

> "The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons. However, the General Assembly of Indiana, with its members elected on a state-wide basis, was not, or should not have been, subservient to local pressures, and undoubtedly could have legislated a county-wide school system for Marion County as easily as it legislated a county-wide civil government. Under existing law, both Federal as expressed in Brown v. Board of Education, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), and in Green v. County School Board, 391 U. S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968), and the law of Indiana as expressed in Acts 1949, Ch. 186, p. 603, Burns Ind. Stat. Ann. §§ 28-6106-28-6112 (1970), it had a duty to alleviate the segregated condition then existing in IPS. When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with [sic] IPS.
>
> "The Court finds that the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited inter-district remedy within all of Marion County, Indiana, as hereafter described."

With respect to the remedy, the district court stated:

> "This Court found as a fact in its opinion of July 20, 1973, 368 F. Supp. 1197, et seq., that within the IPS boundaries resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or less. That finding has not been challenged by anyone. Therefore, in a school corporation in which the percentage of black pupils has now reached more than 42% over all, and with the Court of Appeals having ordered this Court to take further steps to desegregate the same, 503 F. 2d 80, the Court is placed in an impossible situation unless the transfer for education of a substantial number of black IPS pupils to school corporations other than IPS is accomplished.
>
> * * * * *
>
> "* * * As the Court understands the order of the Court of Appeals, this group of 20 schools must be further desegregated. As stated above, this Court has previously found that to require all schools to enroll about 42.43% black pupils would immediately accelerate white flight and unbalance the entire system beyond saving. The Court respectfully declines to stultify itself by giving any such direction.
>
> "The Metropolitan School Districts of Washington Township and Pike Township are integrating rather rapidly, as a result of demographic changes, so that Washington had a black percentage of approximately 15% and Pike a black percentage of approximately 12% for the past school year. These percentages seem likely to increase for the coming year. If the percentage of black students in the other suburban districts within Marion County were equivalent to that of Washington Township, approximately 9,525 black students would need to be transferred to such districts. The Court finds that the Fourteenth Amendment compels it to order IPS to transfer, and for the added defendant school corporations, other than Pike and Washington, to receive approximately such number of black students, over a period of time, in order to effect a plan of desegregation within IPS which is acceptable within the meaning of such amendment.
>
> * * * * *
>
> "The number of students to be transferred to a particular school corporation shall be in such a number as to cause the total enrollment of pupils in such school corporation, after the transfers have been accomplished, to be approximately 15% black. * * *"

Simultaneously with the filing of its memorandum of decision on August 1, 1975, the district court entered judgment (Appendix A). The portion thereof affecting appellant reads as follows:

"d. IP 68-C-225D. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Perry Township, Marion County, Indiana, 1,555 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing schools years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein."

All school corporations affected by the judgment appealed to the United States Court of Appeal for the Seventh Circuit. By a 2-1 decision on July 16, 1976, Circuit Judge Tone dissenting, the court of appeals affirmed.

THE QUESTION PRESENTED IS SUBSTANTIAL.

The court of appeals stated that the overall issue it was deciding was "whether the limited interdistrict remedy ordered by the district court is supported by the record and is in accord with the legal principles enunciated in *Milliken* v. *Bradley*, 418 U. S. 717 (1974)." It expressed the opinion that *Milliken's* essential holding is contained in the following language:

> "* * * Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. * * *" (418 U. S. at 745)

It then proceeded with Procrustean determination to make the evidence fit the foregoing holding.

Appellant has always operated a unitary public school system. No evidence is contained in the record to show that it has ever discriminated on the basis of race, creed, national origin, color or sex. The minority races in the various schools operated by appellant are broadly distributed throughout the system. During

the school year of 1971-72 at appellant's Southport High School, a black girl was elected home-coming queen by the student body. The opinion of the court of appeals does not find any racially discriminatory act on the part of appellant that could have been a substantial cause of segregation in IPS. It points solely to acts of the State of Indiana, saying:

> "In this case we are dealing with a situation in which but for certain events chargeable to the state, Marion County would be either a consolidated school district under the 1959 School Reorganization Act or IPS would have been expanded with the civil city of Indianapolis under Uni-Gov. * * *"

The court of appeals indicated that the failure to consolidate all districts within Marion County, Indiana, during the proceedings under The School Corporation Reorganization Act of 1959, IC, 20-4-1, was relevant to its holding that Uni-Gov and its companion 1969 legislation were "a substantial cause of interdistrict segregation." In this regard, it said concerning its mandate to the district court on the prior appeal, 503 F. 2d 68, the following:

> "* * * We interpret the mandate as sufficiently broad to permit consideration of official conduct which arguably bears a historical relationship to the failure to expand the IPS boundaries to match those of Uni-Gov, which includes the failure to change IPS boundaries during the 1959-1962 Indiana school reorganization program and the failure to locate any public housing outside the IPS boundaries. On the intervening plaintiffs' theory of the case, which the district court adopted, this course of conduct was a part of a pattern, of which Uni-Gov was also a part." (Footnote 8)

The court of appeals' characterization of the intervening plaintiffs' theory of the case does violence to the record so far as The School Corporation Reorganization Act of 1959 is concerned. As shown in the statement of the case, *supra*, appellees Buckley (the intervening plaintiffs) in answer to

appellant's interrogatories conceded that their amended complaint makes no attack on that Act and no attack on the validity of the proceedings under that Act by which the Marion County school corporations were created. Moreover, various parties other than appellant applied to the district court to certify the amended complaint of appellees Buckley as appropriate for determination by a three-judge district court pursuant to 28 U. S. C. §§ 2281 and 2284. The district court, in a memorandum of decision dated January 3, 1973, denying the request, held that the statutes challenged in paragraph 10 of the amended complaint "have application only to school corporations in Marion County, Indiana," and then continued:

> "Defendants attempt to avoid the 'local impact' rule by asserting that the complaint by implication challenges the constitutionality of school organization and reorganization, student transfer, and school fund allocation statutes which apply to the entire State of Indiana. The simple fact is that no such allegations, explicit or implicit, are contained in the complaint. * * *"

In stating the facts pertinent to school reorganization in Indiana under the 1959 Act, the court of appeals did its best to make *Evans* v. *Buchanan*, 393 F. Supp. 428 (D. Del. 1975), *affirmed*, 46 L. Ed. 2d 293 (1975), seem "factually analogous to the instant case in many respects." But, again, the opinion does violence to the record. In this regard, the court of appeals stated:

> "In 1959 the Indiana School Reorganization Act, * * * created a complex scheme for consolidating school districts. Consolidations under the Act reduced the number of school districts outside Marion County from 990 to 305. Some 70 percent of the reorganized districts were not coterminous with other units of civil government. In some cases consolidated school districts crossed county lines.
>
> "Marion County, however, was an exception. School districts there were not consolidated. The Marion County Reorganization Committee, appointed pursuant to the Act, initially recommended that all school systems in the county

> be merged into one, but the unanimous opposition of the suburban school districts defeated the merger proposal. There is no evidence that this opposition was racially motivated. * * *"

The School Corporation Reorganization Act of 1959 did not create "a complex scheme for consolidating school districts." It is true that the statute did have as its purpose the elimination of school corporations that were too small to be viable or effective. Thus, in IC, 20-4-1-17, it is stated that "it is the purpose of this act to encourage the development of school corporations which are of sufficient size to provide adequate educational opportunities for the youth of this state." But it was not the purpose of the statute to foster the creation of monster school corporations, the failings of which are well documented nationally. This clearly appears from the definition of "reorganization of school corporations" in the statute, since it included the subdivision of school corporations as well as the uniting of school corporations. In this regard, IC, 20-4-1-3(2), provides:

> "(2) 'Reorganization of school corporations' shall mean and include the formation of new school corporations, the alteration of the boundaries of established school corporations, and the dissolution of established school corporations, through or by means of (a) the uniting of two (2) or more established school corporations; (b) the subdivision of one (1) or more school corporations; (c) the transfer to any established school corporation of a part of the territory of one (1) or more school corporations, and/or the attachment thereto of all or any part of the territory of one (1) or more school corporations, and/or the transfer of said established school corporation; and (d) any combination of the methods aforesaid."

Consolidations under the Act did reduce the number of school districts outside of Marion County, but most of the larger counties emerged from reorganization with a number of school districts. Lake County, which is the second largest Indiana

county after Marion County, has 16 school districts. Of the counties surrounding Marion, three were reorganized with six districts, three with four districts and one with three districts. The largest of such counties has a total enrollment of 16,344 compared with a Marion County enrollment of 179,810.

Marion County, contrary to what the court of appeals said, was not an exception. Reorganization did take place. Two school districts, Woodruff Place and Center Township, were merged into IPS. Of the eleven school districts that remained after reorganization, IPS is by far the largest district in the state, five of the other Marion County districts rank among the twenty-five largest in the state, and no one district in Marion County is below the median size of all school districts in Indiana. The intent and purpose of the 1959 Act were fully met in Marion County.

While the empire builders on the Marion County School Reorganization Committee would have preferred a single, county-wide school district, which would have been the 10th largest in the United States and would have contained 14% of all pupils enrolled in Indiana public schools, they withdrew the plan when they saw that it had no chance of adoption by the voters of the county. Unless the reorganized school corporation was to be created out of an existing school corporation with no change in its territorial boundaries or in its governing body (IC, 20-4-1-18), its creation required either a petition signed by 55% or more of the registered voters residing within the boundaries of the proposed school corporation (IC, 20-4-1-20) or the approval of a majority of the votes cast at a special election of the registered voters residing within the boundaries of the proposed school corporation (IC, 20-4-1-21). As was stated in *James* v. *Valtierra*, 402 U. S. 137 (1971):

> "* * * Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice. * * *" (402 U. S. at 141)

The court of appeals expressly recognized that the opposition in Marion County to a county-wide school corporation was not racially motivated, and its opinion fails to establish any racial effect. Reorganization was completed years before appellee United States filed its complaint charging that IPS was racially segregated. The holding of the court of appeals that "but for certain events chargeable to the state, Marion County would be * * * a consolidated school district under the 1959 School Reorganization Act" is without foundation in the record.

Nor is there any merit in the holding that "but for certain events chargeable to the state, * * * IPS would have been expanded with the civil city of Indianapolis under Uni-Gov." At the time Acts 1969, Chapter 173, the Uni-Gov Act, was passed by the Indiana General Assembly, school boundaries in Marion County were completely independent from and unaffected by civil boundaries. Had the boundaries of the civil city of Indianapolis been extended to the Marion County line by the traditional annexation process, rather than by legislative enactment, the boundaries and jurisdiction of the eleven community school corporations in Marion County would have been wholly unaffected.

The independence of school and civil boundaries was the result of The School Corporation Reorganization Act of 1959, IC, 20-4-1. In this regard, the court of appeals said:

> "As a result of the 1959 Reorganization Act, school boundaries in most of the state were frozen and thereafter unaffected by municipal annexations. In 1961, however, special legislation was enacted to give the schools within Marion County the flexibility lost by the 1959 Reorganization Act. Acts 1961, ch. 186 * * *. Under the 1961 act extension of the boundaries of a civil city automatically extended the corresponding school district boundaries unless the school city and the losing school corporation mutually agreed that the school city territory would not expand with the civil city. The school district whose territory was to be taken could also oppose the civil annexation in a

remonstrance suit. The annexation powers of the city, however, proved to be illusory, for they were effectively frustrated by remonstrance litigation.

"Another means of annexation under the 1961 act was by mutual agreement between school corporations. IPS (and other school districts with boundaries corresponding with those of a civil city) also had a unilateral power of annexation subject to the right of the school district whose territory was to be taken to oppose by remonstrance. No significant action was taken by IPS under this provision.

"In summary, until 1969, the combined action of the State of Indiana and its political subdivisions had the effect of leaving the boundaries of the City of Indianapolis and IPS substantially the same despite statewide school district consolidations made under the 1959 act. True, IPS could expand independently of the city, but the city's annexation prima facie carried IPS with it. Although it turned out that no annexations occurred, the policy of the state, as expressed in the 1961 legislation, was that IPS would expand along with the city.

"In 1969, after this action was filed, two other acts were adopted. On act, Acts 1969, ch. 52, § 3; IC 1971, 20-3-14-9, * * * adopted sixteen days before Uni-Gov was enacted, amended the 1961 act by abolishing the power of IPS to follow municipal annexations. Another act, Acts 1969, ch. 239, § 407; IC 1971, 18-5-10-25, * * * limited the remonstrances against municipal annexations to a few, simple, fairly objective grounds."

Since the discussion in the foregoing passage concerns the "companion 1969 legislation" that, according to the court of appeals, caused the 1969 Uni-Gov Act to be "a substantial cause of interdisrict segregation", it is important to not the flaws in the court's analysis.

Although the constitutionality of Act 1961, Ch. 186, was questioned by the district court in its opinion of August 18, 1971, because it treated Marion County differently than the remainder of the State of Indiana (332 F. Supp. 655, 675-76), and by appellees Buckley in paragraph 10 of their amended

complaint, it is relied on by the court of appeals as expressing the policy of the State of Indiana that IPS would expand along with the city of Indianapolis. However, the conclusion of the court of appeals concerning the policy of the state is open to serious doubt.

Article 8, § 1, of the Constitution of Indiana makes it the duty of the General Assembly "to provide by law for a general and uniform system of common schools", and Article 4, § 23, provides that in all cases "where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." Thus, the policy of the state is that the system of common schools, and the laws pertaining thereto, shall be general and uniform throughout the state. Prior to Acts 1961, Ch. 186, school boundaries and annexations were the subject of general laws of uniform, state-wide applicability. The court of appeals itself refers to the 1961 statute as "special legislation", and as such it undoubtedly was invalid under the provisions of the Indiana Constitution already mentioned. As noted by the court of appeals, no annexation occurred under the 1961 statute, and the portion thereof that provided that IPS boundaries would follow municipal annexations was repealed by Acts 1969, Ch. 52. In other words, the effect of Acts 1969, Ch. 52, was to bring school boundaries in Marion County into conformity with the general and uniform laws affecting school boundaries in all other counties of the State of Indiana.

The court of appeals also stated that another statute, Acts 1969, Ch. 239, § 407, "limited the remonstrances against municipal annexation to a few, simple, fairly objective grounds." There is nothing in the record to show that this made remonstrances less effective as a means of blocking civil annexations, and, in any event, the statute is wholly irrelevant. Had Acts 1969, Ch. 52, not repealed the link between civil and school annexations in Marion County, remonstrances to civil annexation by losing school corporations would have been wholly unaffected by Acts 1969, Ch. 239, § 407. The sole ground of

remonstrance by a losing school corporation to a civil annexation was specified in Acts 1961, Ch. 186, § 9(b) (see Appendix D hereto).

With respect to Uni-Gov, Acts 1969, Ch. 173, as it relates to an interdistrict violation in accordance with *Milliken* v. *Bradley*, 418 U. S. 717 (1974), the court of appeals reasoned:

> "Although Uni-Gov was a neutral piece of legislation on its face with its main purpose to efficiently restructure civil government within Marion County, it cannot be analyzed in isolation if its impact on school district boundaries is to be clearly perceived. Rather it must be considered in conjunction with the two other acts adopted in 1969. * * *
>
> "For some time Mayor Lugar had expressed his desire to embark a more aggressive annexation program in order to bring a greater part of the urbanized area under the city's control. The concept of Uni-Gov was promoted as a more viable alternative to lengthy annexation litigation. The suburban school corporations and their legislative representatives were obviously aware that if Uni-Gov did not pass and the civil city was forced to embark on a more aggressive annexation program as a last resort to reorganizing governmental services, IPS boundaries would automatically extend with the civil city boundaries under the 1961 Annexation Act. In order to avoid this undesired result Chapter 52, 1969 Acts was enacted sixteen days before Uni-Gov was adopted. This Act repealed the provision in the 1961 Act which provided for automatic extension of school city boundaries. Chapter 239, 1969 Acts was also adopted, limiting remonstrances against municipal annexations to a few, simple, fairly objective grounds.
>
> "It must be kept in mind that at this time both the General Assembly and the suburban school districts knew that this action was pending in district court. These 'fail safe' measures indicated a legislative intent (reflecting local sentiments) that by one means or another the boundaries of IPS would not expand with those of the civil city. We say this because a court is entitled to draw reasonable and logical inferences from probable consequences of changes in the law and the evident purpose of such changes.

> "Because in 1969, 95 percent of the blacks in Marion County lived in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were '[A] substantial cause of interdistrict segregation.' *Milliken* v. *Bradley*, 418 U.S. 717, 745 (1974), and '[C]ontributed to the separation of the races by . . . redrawing school district lines . . . . *Id.* at 755 (Stewart, J., concurring)."

The crux of the court's reasoning is that Chapters 52 and 239 of the 1969 Acts were "fail safe" measures enacted to insure that, if Uni-Gov failed of passage and the city embarked on "a more aggressive annexation program as a last resort", IPS boundaries would not follow city boundaries. However, there is nothing in the record to show that "a more aggressive annexation program" would have been any more successful than past annexation programs, which the record shows had failed completely. As already noted, remonstrances by losing school corporations would have been governed by Acts 1961, Ch. 186, § 9(b), and not by Acts 1969, Ch. 239, § 407, as assumed by the court of appeals.

Moreover, the characterization of Acts 1969, Ch. 52, as a "fail safe" measure to detach IPS boundaries from city boundaries in the event Uni-Gov failed to pass is squarely contrary to the undisputed evidence in the record. Legislation identical to Acts 1969, Ch. 52, had been introduced in the 1967 General Assembly as House Bill 1188, and had passed both houses but had been vetoed by Governor Branigan. When the bill was reintroduced in the next General Assembly, it again passed and was signed by Governer Whitcomb on February 25, 1969. Thus, the genesis of Acts 1969, Ch. 52, antedated the Uni-Gov legislation by two years and the original filing of the action by appellee United States against IPS in the district court by more than one year.

The court of appeals concedes that "Uni-Gov was a neutral piece of legislation on its face", and its attempts to show that

it was "a substantial cause of interdistrict segregation" by relating it to supposed "companion 1969 legislation" fails completely. There is nothing in the record to establish that any of the 1969 legislation had a disproportionate effect on racial minorities.

The court of appeals also notes that the Indiana General Assembly, under both federal and state law, "had an obligation to alleviate the segregated condition in IPS." It then goes on to state that "the record fails to show any compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation." The court of appeals, however, closes its eyes to what the record shows.

From the time that Indiana was admitted as a state of the Union in 1816, the common school system has been administered separately and apart from civil government. From 1816 to 1852 school boundaries were, and since 1959 have again been, completely independent of civil boundaries. Even during the period between 1852 and 1959 when school boundaries for the most part were coterminous with civil boundaries, the school and civil corporations were distinct and separate. To this effect, in *Campbell* v. *City of Indianapolis,* 155 Ind. 186, 57 N. E. 920 (1900), it was said:

> "* * * [A] municipal school corporation created by the act of 1865, within the territorial limits of a township, incorporated town, or city, was by the provisions of that law made as distinct and separate a corporation or legal entity, in respect to the civil corporation, as though they each existed in entirely different territory. * * * " (155 Ind. at 208)

Not only have schools always been administered separately and apart from civil government under distinct laws, but statewide reorganization of schools, including those in Marion County, had been completed under The School Corporation Reorganization Act of 1959. The sole purpose of Uni-Gov was to rationalize civil government in Marion County. There

was clearly no reason why the General Assembly should have included school consolidation in the Uni-Gov legislation. If, however, it had attempted to do so, it would have violated Article 4, § 19, of the Indiana Constitution, which provided that "every act * * * shall embrace but one subject and matters properly connected therewith."

Not only is it clear that the court of appeals erred in holding that "Uni-Gov and its companion 1969 legislation were '[A] substantial cause of interdistrict segregation' ", but, as Circuit Judge Tone said in his dissent below, "under *Milliken,* as explained in *Washington* v. *Davis,* 48 L. Ed. 2d 597 (1976), cause and effect are not enough. A racially discriminatory purpose is necessary." Judge Tone concluded:

> "In short, there is no finding and no evidence that the exclusion of IPS from Uni-Gov was racially motivated, and by all objective criteria Uni-Gov was racially neutral state action. Uni-Gov left untouched the boundaries of IPS, which had been established for racially neutral reasons. The changes in civil boundaries and reallocations of civil governmental functions made by Uni-Gov had no effect on the constitutional rights of school children in IPS."

CONCLUSION.

For the reasons stated, probable jurisdiction should be noted and the case set down for an early hearing.

Respectfully submitted,

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APPENDIX A.

OPINIONS BELOW.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Nos. 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965, and 75-2007

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, by their parent and next friend RUBY L. BUCKLEY, on behalf of themselves and all Negro school age children residing in the area served by the original defendants herein ,
Intervening Plaintiffs-Appellees,

vs.

BOARD OF SCHOOL COMMISSIONERS OF CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP-68-C-225
S. HUGH DILLIN, *Judge.*

Argued December 3, 1975—Decided July 16, 1976

Before FAIRCHILD, *Chief Judge*, SWYGERT and TONE, *Circuit Judges.*

SWYGERT, *Circuit Judge*. This is the third review of successive desegregation orders in a suit brought in 1968 by the United States against the Board of School Commissioners of the City of Indianapolis. The issue before us, as in *Milliken* v. *Bradley*, 418 U. S. 717 (1974), concerns the appropriate exercise of federal equity jurisdiction. The district court found two violations of the Equal Protection Clause upon which it based the interdistrict remedies that are at issue on this appeal. The first was the failure of the state to extend the boundaries of the Indianapolis Public School District (IPS) when the municipal government of Indianapolis and other governmental units in Marion County, Indiana, were replaced by a consolidated county-wide government called Uni-Gov. The second violation was the confinement of all public housing projects (in which 98 percent of the residents are black) to areas within the boundaries of the City of Indianapolis.

On the basis of these violations the district court determined that a limited interdistrict remedy would be appropriate. The court ordered a transfer of black IPS students in grades 1-9 to suburban school districts (except two) within Marion County in such number as to cause the total enrollment of pupils in the suburban schools to be 15 percent black after the transfer. The district court also enjoined the Housing Authority of the City of Indianapolis from constructing any future public housing projects inside the boundaries of IPS and from renovating a housing project known as Lockefield Gardens for other than elderly persons.

On the basis of the entire record and the findings of the district court, we affirm.

I

The History of the Case

The history of this litigation was described in our most recent opinion, *United States* v. *Board of School Commissioners of*

City of Indianapolis, Indiana, 503 F. 2d 68, 71-75 (7th Cir. 1974), *cert. denied*, 421 U. S. 929; nonetheless, a brief summary is appropriate.

There have been four phases in this suit. In *Indianapolis I* the sole issue was racial segregation within the schools in the Indianapolis Public School District. Judge Dillin, after noting Indiana's official policy of school segregation until 1949, reviewed the conduct of IPS since that year and found the school district guilty of *de jure* segregation. *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana*, 332 F. Supp. 655 (S. D. Ind. 1971).

The court then ordered the United States to add as defendants other school districts in the metropolitan area in order to provide the proper setting for consideration of the appropriateness of a metropolitan remedy. The Government complied with the order. The Buckley plaintiffs, representing a class of black school children, were granted permission to intervene. They joined as defendants several state officials and additional school districts.

On appeal this court affirmed, finding that there was a clear pattern of purposeful discrimination in the gerrymandering of school attendance zones, in the segregation of faculty, in the use of optional attendance zones among the schools, and in school construction and placement—a "[P]attern of decision making which . . . reflected a successful plan for *de jure* segregation." *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana*, 474 F. 2d 81, 84-88 (7th Cir. 1973), *cert. denied*, 413 U. S. 920.

After remand from this court, the district court in *Indianapolis II* took up the problem of fashioning a remedy. One of the issues at trial was the constitutionality of the Uni-Gov Act. The court ordered a remedy without reaching this question. The court found that a meaningful permanent desegregation plan could not be accomplished within the boundaries of IPS, based upon evidence that when the percentage of blacks in a given school

approaches 25 to 30 percent white flight accelerates, resulting in resegregation. *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 368 F. Supp. 1191 (S. D. Ind. 1973). The court further found that the State of Indiana, its officials, and agencies by various acts and omissions promoted segregation and inhibited desegregation within IPS, so that the state which was ultimately charged under the Indiana law with the operation of its public schools had a continuing affirmative duty to desegregate the Indianapolis school system.

The court then ordered a broad interdistrict remedy which encompassed the entire metropolitan area including school districts outside of Marion County. The court held it was the duty of the state, through its General Assembly, to device its own plan of desegregation, with the understanding that if it failed to do so within a reasonable time the court would have the authority and duty to formulate its own plan. As interim relief, the court ordered IPS to effect pupil reassignment for the 1973-1974 school year sufficient to bring the number of black pupils in each of its elementary schools to approximately 15 percent.

In response to the court's order for the interim relief, IPS submitted a desegregation plan. The court rejected it as inadequate and appointed a two-member commission to develop a plan. This plan was approved by the court and has been implemented. The district court also ordered IPS to transfer to certain defendant school districts a number of black pupils equal to 5 percent of the 1972-1973 enrollment of each transferee school (with certain exceptions). (This portion of the order was stayed incident to subsequent proceedings.) *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 368 F. Supp. 1223 (S. D. Ind. 1973).

In *Indianapolis III* the court issued a supplementary opinion in which Judge Dillin proffered recommendations to the State of Indiana for implementing a desegregation plan. In response, the General Assembly adopted a bill that provides for the adjust-

ment of tuition among the transferor and the transferee districts and for the reimbursement of transportation costs by the state whenever a federal or state court makes certain findings.[1]

On appeal from *Indianapolis II and Indianapolis III* this court, besides affirming the commission's interim IPS plan, affirmed the district court's holding that the State of Indiana, as the ultimate body charged with responsibility of operating its public schools, "[H]as an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries. . . ." *United States* v. *Board of School Commissioners,* 503 F. 2d 68, 80 (7th Cir. 1974), *cert. denied,* 421 U. S. 929. This court, however, in accordance with *Milliken* v. *Bradley,* 418 U. S. 717 (1974), reversed the district court's order pertaining to the inter-district remedy as to those school districts outside of Uni-Gov (Marion County). That portion of the order pertaining to the interdistrict remedy within Uni-Gov was vacated and remanded for further proceedings. We said:

> The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken.* 503 F.2d at 86.

---

1. The Indiana Statute, Acts 1974, P. L. 94, § 1; I. C. 1971, 20-8.1-6.5-1, Burns Ind. Stat. Ann. § 28-5031 (1971), provides in pertinent part:

> This chapter applies solely in a situation where a court of the United States or of the State of Indiana in a suit to which the transferor or transferee corporation or corporations are parties has found the following: (a) a transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders; (b) a unitary school system within the meaning of such Amendment cannot be implemented within the boundaries of the transferor corporation, and (c) the Fourteenth Amendment compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such Amendment.

On remand, in *Indianapolis IV* (unreported opinion), the district court held another evidentiary hearing on Uni-Gov and housing practices within Marion County. In regard to Uni-Gov Judge Dillin found:

> The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons. . . . When the General Assembly [which under state and federal law had a duty to alleviate segregation in IPS] expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation [*sic*] IPS.

Referring to the suburban Marion County units of government, he stated:

> They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has [*sic*] been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court.

With respect to the public housing authorities the district judge said:

> The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI is located within IPS territory, in some instances just across the street from territory served by one of the added defendant school corporations. Each of such

> locations was approved—in some instances selected in the first place—by the added defendant Commission. The latter institution has had county-wide zoning jurisdiction at all times during the construction of 10 out of the 11 public housing projects for families, and HACI has at all times had the authority to erect public housing within the City of Indianapolis, and within five miles of the corporate limits of such city. The residents of said public housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.

Based on these findings and those set forth in his former opinions, Judge Dillin ruled that an interdistrict remedy was necessary to effect desegregation within IPS. He again found that if desegregation were limited to IPS, schools within IPS would become 42 percent black, and that this percentage exceeded the "tipping point" at which resegregation would occur. He commented:

> The Court of Appeals has called the attention of this Court to the rule of law that "white flight" is not an acceptable reason for failing to dismantle a dual school system. 503 F.2d 80, citing *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 491, 92 S.Ct. 2214, 2218, 33 L.Ed.2d 75 (1970). However, it does not follow that this Court must ignore the probability of white flight in attempting to formulate guidelines for IPS to follow in accomplishing the final desegregation of its schools. In other words, as this Court sees it, white flight may not be used as an excuse for inaction; it may, however, supply the reason for a particular kind of action.

Judge Dillin therefore ordered the transfer of 6,533 students from IPS to other school districts in Marion County. An additional 3,000 students were to be transferred in the second year of the plan, raising the proportion of black students in the

suburban schools to 15 percent.[2] No transfers were ordered to Washington and Pike Townships, which already had black populations of 12 and 4 percent. The district court also enjoined the Housing Authority from building any more family housing projects in IPS territory and from renovating an all black project called Lockefield Gardens. Finally, the Buckleys were awarded attorneys' fees under 20 U. S. C. § 1617.

All the defendants have appealed. The defendants other than the Housing Authority challenge the interdistrict transfers ordered by the district court. The Housing Authority challenges the injunction against it. On the other side, the Buckleys, together with an *amicus curiae*, the Coalition for Integrated Education, argue for affirmance of the district court order. The United States argues that the finding of interdistrict violations should be sustained but seeks modification of the portion of the order calling for mandatory interdistrict transfers of students. It argues for affirmance of the injunction against the Housing Authority.

II

Facts Pertinent to This Appeal

A. Residential and School Demography of Marion County

In 1969 when Uni-Gov was created, 95 percent of the blacks in Marion County lived in Indianapolis. Only about 50 percent of the whites in the county lived in the city. The black population continues to grow within the core city as reflected by ratios in the schools. The percentage of black students in IPS increased from 36 percent in 1968 to 42 percent in 1975. The 1974-1975 black/white ratio in IPS was 57.22 percent white and 42.16 percent black. On the other hand, the overall ratio in Marion County was 74.87 percent white and 24.40 percent

2. IPS will be obligated to pay the suburban school districts the cost of educating the transferred pupils. See *supra*, n. 1.

black.[3] For the years 1974-1975 the racial composition of the suburban school districts within Marion County was as follows:

Township	Percentage of White	Percentage of Black
Decatur	99.83	.9
Franklin	99.35	.54
Lawrence	95.50	2.9
Perry	98.64	.23
Warren	98.61	.73
Wayne	97.87	1.19
Beech Grove	99.64	.04
Speedway	99.10	.72

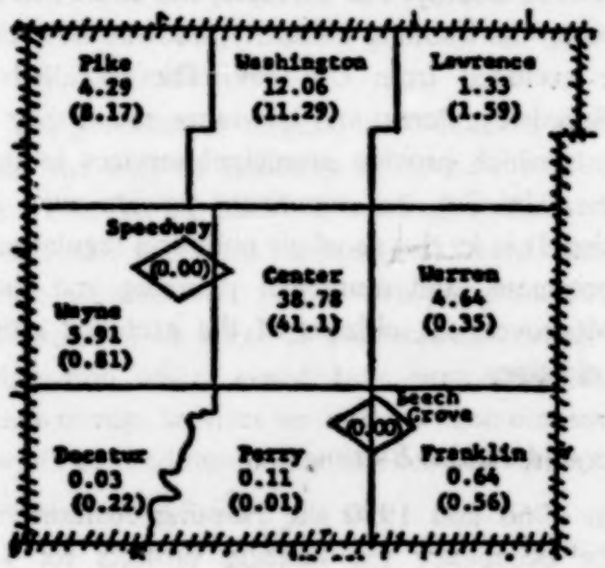
B. Uni-Gov

Until 1969 the boundaries of IPS corresponded roughly to the boundaries of the City of Indianapolis, and the other Marion

3. The black population in Marion County is reflected by the following map.

1973

Percentage of Black Residents in Marion County
(Percentage of Black Students in Marion County Schools)



County school districts were truly suburban. In 1969, however, the so-called Uni-Gov Act, which is officially titled the "First Class Consolidated Cities and Counties Act," Acts 1969, ch. 173, § 101; I. C. 1971, 18-4-1-1 *et seq.*, Burns Ind. Stat. Ann. §§ 48-9101 *et seq.* (1971), transformed Marion County into a consolidated metropolitan government. School districts were specifically excluded from Uni-Gov.

Uni-Gov is governed by a major and council. Its purpose was to efficiently reorganize civil government within Marion County. Previously, there had been a splintering of governmental responsibility into loosely controlled agencies with overlapping jurisdictions. Uni-Gov has succeeded to most of the functions of county government and of numerous special service districts. It has also succeeded to the functions of the City of Indianapolis and provides municipal services such as police and fire protection within the approximate area of the old city. The Act contains provisions for expanding the areas in which Uni-Gov delivers these municipal services. See, *e.g.*, I. C. 1971, 18-4-12-36 (fire district); I. C. 1971, 18-4-12-8 (police district).

Uni-Gov has not, however, replaced all existing governmental units in Marion County. For example, the airport authority, the county courts, the building authority, and the hospital corporation were excluded from Uni-Gov. The so-called "excluded cites" of Speedway, Perry, and Lawrence retain their own local governments which provide municipal services in those areas. Nonetheless, Uni-Gov has significant powers even in the excluded cities. It is in charge of air pollution regulation, building code enforcement, and municipal planning and thoroughfare control. Moreover, the citizens of the excluded cities vote in Uni-Gov elections.

C. History of Public Housing

Between 1966 and 1970 the Housing Authority built and opened for occupancy ten housing projects for low-income

families. These and Lockefield Gardens, which was built during the depression, are the only public housing projects for family occupancy in Marion County, although other forms of subsidized housing are available. All ten projects were built within the boundaries of IPS. These projects opened with 50 to 75 percent black occupanies and are now 98 percent black.

The Housing Authority was authorized under state law to construct projects within Indianapolis and within five miles of the city's boundaries. Federal funding could be obtained only if the Housing Authority entered into a cooperation agreement with the municipality or other civil governmental entity having jurisdiction over the territory in which it desired to build. The City of Indianapolis entered into a cooperation agreement with the Housing Authority, but no other governmental entity in Marion County did so, even though the Housing Authority approached the county commissioners about an agreement.

Since 1969, when Uni-Gov became effective, the Housing Authority has apparently had the authority to construct projects outside the old city limits, except in the Towns of Speedway, Lawrence, and Beech Grove, without the need for cooperation agreements. No housing projects have been commenced within or outside IPS since that time nor are any planned. The record does not show why. There are presently pending applications for approximately 3,000 families.

The Housing Authority argued that suitable sites did not exist outside the City of Indianapolis because services such as public transportation would have been unavailable. There was evidence, however, that these services could have been arranged. The evidence showed that public transportation routes could have been extended to areas of demonstrated need, that food stamp distribution offices could have been established at the projects, that sewage services could have been obtained by contract with the city, and that police and fire protection could have been obtained from the city.

Six of the housing projects are on the IPS boundary lines or within a few blocks thereof. For example, Clearstream Gardens was located on the IPS side of a street which divided IPS and Warren Metropolitan School District. A witness for the Housing Authority under, questioning by the district court, was unable to state why, "from the standpoint of these criteria you mentioned," there was "any difference at all between the location on the east side of the west side of Emerson Avenue." The other projects and their locations are set forth below.[4] These projects contain between 900 and 1,000 family units and house a substantial number of black school children.

D. History of School District Boundaries

Until 1969, under a variety of laws which are discussed below, the IPS boundaries were largely coterminous with the city boundaries. Under a 1931 act, the boundaries of IPS were made coterminous with those of the city. Acts 1931, ch. 94, §1; I. C. 1971, 20-3-11-1, Burns Ind. Stat. Ann. § 28-2601 (1971).[5] Until 1959, boundaries of school districts and municipalities were also coterminous elsewhere in Indiana, with some

4. Rowney Terrace is ten blocks north of Clearstream Gardens on the same boundary line between IPS and Warren Metropolitan School District (MSD).

Raymond Villa is approximately four blocks north of the boundary line between IPS and Beech Grove.

Laurelwood is in a narrow peninsula of IPS that is surrounded on three sides by Perry MSD.

Concord Village is approximately one-half mile from the Speedway boundary.

Eagle Creek is on the boundary line between IPS and Wayne MSD.

5. Acts 1963, ch. 310, § 4; I. C. 1971, 20-3-11-33, Burns Ind. Stat. Ann. § 28-2633 (1971), provides that the 1931 act remains in effect except to the extent that its various provisions are inconsistent with the 1959 act discussed in the text. The provision of the 1931 act making IPS boundaries coterminous with those of Indianapolis is inconsistent with the 1959 act and consequently was not reenacted by the 1963 act. The 1963 act did not purport to affect the provisions of the 1961 act discussed in the text .

exceptions, and the IPS boundaries merely reflected the generally prevailing condition.

In 1959 the Indiana School Reorganization Act, Acts 1959, ch. 202, § 1; I. C. 1971, 20-4-1-1 *et seq.*, Burns Ind. Stat. Ann. § 28-3501, n (1971), created a complex scheme for consolidating school districts. Consolidations under the Act reduced the number of school districts outside Marion County from 990 to 305. Some 70 percent of the reorganized districts were not coterminous with other units of civil government. In some cases consolidated school districts crossed county lines.

Marion County, however, was an exception. School districts there were not consolidated. The Marion County Reorganization Committee, appointed pursuant to the Act, initially recommended that all school systems in the county be merged into one, but the unanimous opposition of the suburban school districts defeated the merger proposal. There is no evidence that this opposition was racially motivated.[6] The Committee's ill-fated consolidation proposal was intended to "develop equal educational opportunities for all children in Marion County," and to "eliminate the confusion of school transfers and dislocations involved in annexation proceedings."

The most substantial reasons against consolidation noted in the Committee's report were that a consolidated school district would be large, with consequent loss in citizen participation and interest in school affairs, and that merger would result in increased school taxes in IPS and two of the suburban districts. The Committee explained that the consolidation plan "had no widespread support—only organized opposition," and that it did not wish to "force a plan (however sound in its inception) upon an unwilling or reluctant public." So, although it believed the arguments in favor of its plan far outweighed the opposition

6. The district judge's comment is pertinent. "In fact, the evidence shows that, with a few exceptions, none of the added defendants have had the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none, . . ." *United States* v. *Board of School Commissioners,* 368 F. Supp. at 1203.

arguments, the Committee, as the district court found, "[R]eversed itself and proposed a plan which, with minor exceptions . . . froze all existing school corporations in Marion County according to their then existing 1961 boundaries." *United States* v. *Board of School Commissioners*, 368 F. Supp. 1191, 1203 (S. D. Ind. 1973). The Committee thereby abandoned both its merger plan and a less radical plan which would have restructured school boundaries on what the Committee regarded as a more rational basis than existing boundaries. Accordingly, the plan adopted in 1962, after approval by the state, did not significantly change boundaries in Marion County, but left those boundaries coterminous with those of civil governmental bodies.

As a result of the 1959 Reorganization Act, school boundaries in most of the state were frozen and thereafter unaffected by municipal annexations. In 1961, however, special legislation was enacted to give the schools within Marion County the flexibility lost by the 1959 Reorganization Act. Acts 1961, ch. 186, § 1; I. C. 1971, 20-3-14-1 *et seq.*, Burns Ind. Stat. Ann. § 28-3610 (1971). Under the 1961 act extension of the boundaries of a civil city automatically extended the corresponding school district boundaries unless the school city and the losing school corporation mutually agreed that the school city territory would not expand with the civil city. The school district whose terirtory was to be taken could also oppose the civil annexation in a remonstrance suit. The annexation powers of the city, however, proved to be illusory, for they were effectively frustrated by remonstrance litigation.[7]

Another means of annexation under the 1961 act was by mutual agreement between school corporations. IPS (and other school districts with boundaries corresponding with those of a civil city) also had a unilateral power of annexation subject to the right of the school district whose territory was to be taken

7. This frustration of the city's annexation efforts was one of the reasons for Uni-Gov given by Mayor Lugar in his testimony before the district court.

to oppose by remonstrance. No significant action was taken by IPS under this provision.

In summary, until 1969, the combined action of the State of Indiana and its political subdivisions had the effect of leaving the boundaries of the City of Indianapolis and IPS substantially the same despite statewide school district consolidations made under the 1959 act. True, IPS could expand independently of the city, but the city's annexation prima facie carried IPS with it. Although it turned out that no annexation occurred, the policy of the state, as expressed in the 1961 legislation, was that IPS would expand along with the city.

In 1969, after this action was filed, two other acts were adopted. One act, Acts 1969, ch. 52, § 3; I. C. 1971, 20-3-14-9, Burns Ind. Stat. Ann. § 28-3618 (1971), adopted sixteen days before Uni-Gov was enacted, amended the 1961 act by abolishing the power of IPS to follow municipal annexations. Another act, Acts 1969, ch. 239, § 407; I. C. 1971, 18-5-10-25, Burns Ind. Stat. Ann. § 48-722 (1971), limited the remonstrances against municipal annexations to a few, simple, fairly objective grounds.

III

The overall issue in this appeal is whether the limited interdistrict remedy ordered by the district court is supported by the record and is in accord with the legal principles enunciated in *Milliken* v. *Bradley*, 418 U. S. 717 (1974). Subsumed in the issue are two questions: (1) whether the establishment of Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov, and (2) whether the district court correctly enjoined the Housing Authority of the City of Indianapolis from locating any additional publicly funded housing projects within the boundaries of IPS and from renovating any existing facility for other than the elderly.[8]

8. The school district defendants argue that our mandate limited inquiry on remand to Uni-Gov itself. It is true that our remand "[F]or further proceedings consistent with" *Milliken* v. *Bradley* was

(Continued on next page)

In our opinion, *Milliken's* essential holding is contained in the following language written by Mr. Chief Justice Burger:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U. S., at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. *Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.* Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by

(Continued from preceding page)

qualified by the specific direction to "[De]termine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken.*" *United States* v. *Board of School Commissioners*, 503 F. 2d 68, 86 (7th Cir. 1974), *cert. denied*, 421 U. S. 929. This direction, however, was itself qualified by a footnote quoting from passages in the opinion of the Court in *Milliken* and in Mr. Justice Stewart's concurring opinion. Both passages mention the drawing of school district lines on the basis of race as a possible ground for interdistrict relief; the former also includes as a possible ground discriminatory acts of other school districts; and the latter mentions "[P]urposeful, racially discriminatory use of state housing or zoning laws" by state officials. *Id.* at n. 23. We interpret the mandate as sufficiently broad to permit consideration of official conduct which arguably bears a historical relationship to the failure to expand the IPS boundaries to match those of Uni-Gov, which includes the failure to change IPS boundaries during the 1959-1962 Indiana school reorganization program and the failure to locate any public housing outside the IPS boundaries. On the intervening plaintiffs' theory of the case, which the district court adopted, this course of conduct was a part of a pattern, of which Uni-Gov was also a part.

> the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy. (emphasis added.) *Milliken* v. *Bradley*, 418 U. S. 717, 744-45.

That holding was further explicated in *Hills* v. *Gautreaux*, 44 U. S. L. W. 4480, 4484 (U. S. April 20, 1976), where Mr. Justice Stewart wrote:

> The Court's holding that there [*Milliken* v. *Bradley*] had to be an interdistrict violation or effect before a federal court could order the crossing of district boundary lines reflected the substantive impact of a consolidation remedy on separate and independent school districts. The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.

In *Milliken* the majority opinion also noted that, "[I]n its present posture the case does not present any question concerning possible state housing violations." *Milliken* v. *Bradley, supra* at 728, n. 7. Mr. Justice Stewart, in his concurring opinion, explicitly explained the relevance of housing discrimination as it relates to an interdistrict remedy in school desegregation cases. Mr. Justice Stewart wrote:

> Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, . . . by transfer of school units between districts, . . . or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate. *Id.* at 755.

With these holdings in mind we turn to the issue of Uni-Gov as it relates to an interdistrict violation.

Although Uni-Gov was a neutral piece of legislation on its face with its main purpose to efficiently restructure civil govern-

ment within Marion County, it cannot be analyzed in isolation if its impact on school district boundaries is to be clearly perceived. Rather it must be considered in conjunction with the two other acts adopted in 1969. (See *supra* pp. 12-13.)

For some time Mayor Lugar had expressed his desire to embark on a more aggressive annexation program in order to bring a greater part of the urbanized area under the city's control. The concept of Uni-Gov was promoted as a more viable alternative to lengthy annexation litgation.[9] The suburban school corporations and their legislative representatives were obviously aware that if Uni-Gov did not pass and the civil city was forced to embark on a more aggressive annexation program as a last resort to reorganizing governmental services, IPS boundaries would automatically extend with the civil city boundaries under the 1961 Annexation Act.[10] In order to avoid this undesired result Chapter 52, 1969 Acts was enacted sixteen days before Uni-Gov was adopted. This Act repealed the provision in the 1961 Act which provided for automatic extension of school city boundaries with the extension of civil city boundaries. Chapter 239, 1969 Acts was also adopted, limiting remonstrances against municipal annexations to a few, simple, faily objective grounds.

It must be kept in mind that at this time both the General Assembly and the suburban school districts knew that this action was pending in district court. These "fail safe" measures indicated a legislative intent (reflecting local sentiments) that by one means or another the boundaries of IPS would not expand with those of the civil city. We say this because a court is entitled to draw reasonable and logical inferences from

9. Prior city administrations had not strongly pursued civil annexations and those that had been adopted were being effectively thwarted by remonstrances in the courts.

10. Under the 1961 Annexation Act the only way to avoid automatic extension of the school city boundaries, other than by remonstrance, was by mutual agreement between the acquiring and losing school corporations that the school city boundaries would not extend with the civil city boundaries.

probable consequences of changes in the law and the evident purpose of such changes.

Because, in 1969, 95 percent of the blacks in Marion County lived in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were "[A] substantial cause of interdistrict segregation." *Milliken* v. *Bradley,* 418 U. S. 717, 745 (1974), and "[C]ontributed to the separation of the races by . . . redrawing school district lines. . . ." *Id.* at 755 (Stewart, J., concurring).

The General Assembly, under both federal law as expressed in *Brown* v. *Board of Education,* 349 U. S. 294 (1955), and in *Green* v. *County School Board,* 391 U. S. 430 (1968), and Indiana law as expressed in Acts 1949, ch. 186, §§ 1-6, 8, as repealed by Acts 1973, P. L. 218, § 1; I. C. 1971, 20-8.1-2-1 —20-8.1-2-7, Burns Ind. Stat. Ann. § 28-5304 (1971), had an obligation to alleviate the segregated condition in IPS. The record fails to show any compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation. The desirability for a unitary civil government should not have precluded the General Assembly from considering the needs of the school system in its decision to enact Uni-Gov. As we noted earlier, the most substantial reasons advanced against the consolidation of the schools in Marion County when it was under consideration in 1959 were that a consolidated school district would be large, with consequent loss of citizen participation, and that it would increase taxes. These considerations, although apparently not racially motivated, cannot justify legislation that has an obvious racial segregative impact. Administrative convenience cannot be a justification for violating the Equal Protection Clause. The district court correctly observed, "When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with [*sic*] IPS."

In summary, we are convinced that the essential findings for an interdistrict remedy found lacking in *Milliken* are supplied by the record in the instant case. In *Milliken* the Supreme Court noted that the Detroit school boundaries were coterminous with the civil city boundaries and "[W]ere established over a century ago by neutral legislation. . . ." *Milliken* v. *Bradley*, 418 U. S. 717, 748 (1974). The Court also observed the district court did not find that the segregative acts within Detroit effected segregation within the other districts. *Id.* at 721. Furthermore, the suburban school districts had not participated in the proceedings, *id.* at 722, and finally, there had been no evidence of any racially discriminatory acts of the state which had been substantial causes of interdistrict segregation, *id* at 745. The remedy chosen by the district court required a consolidation of fifty-four districts "into a vast new super school district," *id.* at 743.

Indianapolis presents an entirely different situation. The Indianapolis Legislature acted directly in passing Uni-Gov, thereby creating the existing situation which confines black students within IPS. Moreover, the suburban governmental units made it politically expedient that Uni-Gov not include the schools.

In this case we are dealing with a situation in which but for certain events chargeable to the state, Marion County would be either a consolidated school district under the 1959 School Reorganization Act or IPS would have been expanded with the civil city of Indianapolis under Uni-Gov. In this context there is nothing talismanic about the word "district", for school district lines are not sacrosanct. *Milliken, supra* at 744. The following hypotheticals are helpful in analyzing the problem.

> (a) City A has one school district, coterminous with City A. The Government brings a suit, alleging *de jure* segregation in the city schools, particularly in the northeast portion of the city. The defendant school board agrees that the northeast portion of the city must be desegregated, but argues that a district wide remedy is unnecessary,

> that is, that only the schools in the northeastern portion of City A need be affected. On these facts, *Keyes* v. *School District No. 1*, 413 U. S. 189, 208 (1973), would control.
>
> (b) City B has one school district that is coterminous with city boundaries. Perhaps fearing an impending desegregation suit, City B decides to contract its school district boundaries so that the school district encompasses the bulk of the central city while the outlying areas of the city organize their own school districts. On these facts, no federal court in a desegregation suit would hesitate in ordering the crossing of district lines to effect a remedy.
>
> (c) City C decides to expand its boundaries and annexes the suburbs surrounding it into a unitary civil government. However, it retains its school district boundaries, previously coterminous with its former city boundaries. In every other respect it provides full city services in and exercises full city authority over the newly acquired territory. These facts are analogous to those of the case at bar. In the event of a meritorious desegregation suit in hypothetical City C, a district court could properly order an interdistrict remedy under *Milliken*.

There is no dispute that a school district may not contract its territory in order to avoid desegregation. *Cf. Wright* v. *Council of City of Emporia*, 407 U. S. 451 (1972). Conversely, a city should not be permitted to extend its boundaries in order to avoid desegregation.

Evans v. *Buchanan*, 393 F. Supp. 428 (D. Del. 1975), *aff'd*, ... U. S. ....., 44 U. S. L. W. 3299 (1975), is a case which is factually analogous to the instant case in many respects and in accord with *Milliken*. In *Evans* the district court had to consider the segregative effects of the Education Advancement Act of 1968, a Delaware school reorganization statute, which explicitly excluded the Wilmington district from a general reorganization of Delaware school districts. Although the district court concluded that the provisions excluding the Wilmington district from school reorganization were not purposefully, racially discriminatory, this did not end its inquiry. The court noted,

"Statutes that do not explicitly deal with race but have a pronounced racial effect, . . . can also establish suspect racial classifications." *Evans* v. *Buchanan, supra* at 441. It further stated that "[W]here a statute, either explicitly or effectively, makes the goals of a racial minority more difficult to achieve than other related governmental interests, the statute embodies a suspect racial classification and requires a particularly strong justification." *Id.* The court therefore held that the Education Advancement Act, although racially neutral on its face, "[H]ad a significant racial impact on the policies of the State Board of Education, . . ." *id.* at 442-443, and thereby constituted a suspect classification. In effect, the statute prevented a predominantly black school district from being reorganized with a predominantly white suburban school district while other districts in the state were able to consolidate. The court finally concluded that "Neither . . . interest in preserving a historic school district boundary, nor the interest in maintaining districts with enrollments below 12,000 . . .,"*id.* at 445, was a compelling state interest and did not justify the exclusion of Wilmington in the Education Advancement Act. On this basis the district court ordered an interdistrict remedy. The Supreme Court summarily affirmed.

In light of the above we find that the limited interdistrict remedy ordered by the district court was proper.

IV.

We now turn to the housing issue. As we stated above 95 percent of the black residents of Marion County live in the inner city. Surrounding the inner city are suburbs populated largely by white residents. This phenomenon may have many causes, but we think the district judge was correct in finding as the primary reason discrimination in the availability of housing opportunities for blacks in the suburbs. We are in agreement with Judge Dillin's statement:

> Although it is undoubtedly true that many factors enter into demographic patterns, there can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the urban centers in the north, including Indianapolis, has been racial discrimination in housing which has prevented them from living any place else. *United States* v. *Board of School Commissioners,* 68 F. Supp. 1191, 1204 (S. D. Ind. 1973).

Although the Housing Authority had jurisdiction outside the IPS boundaries, it did not locate any of the public housing projects in that territory. Instead, all ten of the public housing projects whose occupancy is 98 percent black were located within IPS. It is obvious that there is a close relationship between the racial balance in housing and the racial balance in schools. As Judge Dillin found in his 1971 opinion, "Low-rent housing projects within the School City have significantly affected the racial composition of the schools." *United States* v. *Board of School Commissioners,* 332 F. Supp. 655, 673 (S. D. Ind. 1971). He reaffirmed this in his most recent decision, "The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory." The record supports these findings and clearly shows a 'purposeful, racially discriminatory use of state housing." *Milliken* v. *Bradley,* 418 U. S. 717, 755 (1974) (Stewart, J., concurring). The Government's statement in its brief supports this view:

> Given that a disproportionate number of blacks are both in low income categories and were already concentrated in IPS and considering the predominantly black composition of the pool of applicants for the H.A.C.I. low-income housing projects, it is a reasonable inference that this action would and did have a further impact upon the racial compositions of schools and school districts in Marion County.

The Housing Authority contends the district court had no authority to enjoin it from building additional public housing

within IPS and from renovating Lockefield Gardens for other than the elderly because the court could not lawfully find a constitutional violation by HACI in confining its housing projects to IPS territory. The evdience presented above, however, is to the contrary.

By locating its projects within IPS and in many cases near all black neighborhoods, the Housing Authority significantly contributed to the disparity in residential and school populations between the inner city and the suburbs. Its acts produced discriminatory effects both within IPS and the suburbs. The relief ordered by the district court was directed to correcting the effects of those past discriminatory acts. Accordingly, the district court did not abuse its discretion in enjoining the Housing Authority from building additional projects within IPS. That part of the injunction that relates to Lockefield Gardens was also proper since permitting it to be used for family housing, where school children are undoubtedly involved, would only further aggravate the school segregation problem.

V.

The Government contends that the mandatory transfer of students between IPS and the suburban schools ordered by the district court is improper. After conceding the import of *Milliken*, the propriety of interdistrict relief, and noting the specific finding of facts found by the district court to have substantially caused segregation in the other districts, the Government concludes the district court's order was an abuse of discretion. We are confused by the Government's reasoning. We fail to see how the district court abused its discretion when it was clearly acting within the guidelines of *Milliken*. It was not an abuse of discretion merely because the Government would have preferred another remedy.

Furthermore, the Government's arguments are inconsistent. On the one hand, it demands that segregation be eliminated

root and branch from within IPS; on the other, it condemns the only relief which can make its demand a reality. We are surprised the Government seriously offers voluntary transfer as an alternative to mandatory transfer as a means to effectuate its goal of complete desegregation. History has taught us that "freedom of choice" plans produce negligible results. *Green* v. *County School Board*, 391 U. S. 430 (1967).

Even if we were to agree with the Government that voluntary transfers are desirable, Indiana law provides no secure mechanism for achieving this result. The Government suggests that voluntary transfers can be made in accordance with Acts 1973, P. L. § 1; I. C. 1971, 20-8.1-6 1, Burns Ind. Stat. Ann. § 28-5001 (1971), which permits transfers under certain conditions.[11] We do not agree, however, that this law is sufficient to provide for the kind of transfers the district court ordered. The language in the statute is permissive and vague (a transfer *may* be granted if the school corporation feels a child may be better accommodated in another school) and does not contemplate transfers for desegregation purposes. We could hardly believe we were carrying out our duty to dismantle segregation root and branch if we were to choose this law to accomplish our goal.

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11. The statute provides:

> Transfer—General order. — The governing body of any school corporation may grant an order of transfer upon proper application by the parent of any child who resides in that corporation if it feels the child may be better accommodated in the public schools of another school corporation of this state or of an adjoining state. In detetermining whether a child can be better accommodated, such matters as the proximity of the schools to the residence of the child desiring the transfer, the kind and character of the roads, the means of transportation, and the crowded conditions of the school shall all be pertinent. If there is no high school in the school corporation in which a child resides, the governing body shall grant an order of transfer. When a transfer is granted under this section, transfer tuition shall be paid as provided in this chapter.

The limited interdistrict remedy ordered by the district court is supported by the record and in accord the legal principles enunciated in *Milliken.*

In affirming the district court's order, we suggest that the court monitor the transferance of black pupils from IPS to the other school districts periodically, perhaps on a yearly basis, in order that modifications, if necessary, may be made. This is in the hope that segregation and discrimination will be completely eradicated within IPS in furtherance of the goal of equal opportunity proclaimed two hundred years ago in the Declaration of Independence.[12]

AFFIRMED.

Tone, *Circuit Judge*, dissenting.* There are only two possible interdistrict constitutional violations, in view of our decision on the second appeal, *United States* v. *Board of School Commissioners,* 503 F. 2d 68 (7th Cir. 1974), *cert. denied,* 421 U. S. 929 (1975), as the majority recognizes. These two possibilities are Uni-Gov and the Housing Authority's location of public housing, as to both of which the District Court heard evidence and made findings on remand.

12. Supplementing Judge Tone's footnote to his dissent, the author of this opinion acknowledges extensive borrowing from Judge Tone's original draft of an opinion, particularly with respect to the factual background of this case. That use made my task easier, and I am indeed grateful.

* The writing of the court's opinion was initially assigned to me, my tentative vote at conference having been to affirm. After I had devoted much time toward the preparation of an opinion, I came to the view reflected in this dissent. The writing of the court's opinion was therefore reassigned to Judge Swygert, who was already burdened with his share of the work of the Seventh Circuit but nevertheless had to find time for this case. While the results of my work on the record, which I made available to him, were I hope of some use in connection with the writing of his opinion, he got a very late start because of the circumstances just described. I recite this intramural history to record the reason for the unusual delay between oral argument and decision and the fact that Judge Swygert is not responsible for that delay.

Whether these state actions violated the Equal Protection Clause depends upon the existence of a racially discriminatory purpose. Disproportionate effect on minorities without discriminatory purpose is not enough. If this was not clear after *James* v. *Valtierra,* 402 U. S. 137 (1971), *Jefferson* v. *Hackney,* 406 U. S. 535, 548-549 (1972), and *Keyes* v. *School District No. 1,* 413 U. S. 189, 208 (1973), it was made so by *Washington* v. *Davis,* 44 U. S. L. W. 4789 (U. S., June 7, 1976). The Court squarely held in the latter case that equal protection is denied only when the state acts with a racially discriminatory purpose:

> "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. [Original emphasis.]
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> * * * * *
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> "The school desegration cases have . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause.
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> * * * * *
>
> ". . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." 44 U.S.L.W. at 4792, 4793.

The record before us does not contain findings or evidence that the state acted with a racially discriminatory purpose in connection with Uni-Gov or public housing siting.[1] An essential element of an equal protection violation is therefore missing.

1. The criterion of racially discriminatory purpose is, of course, often not easy to apply. Even if, in any given case, a body such as a legislature or school board can be said to have a collective intent (see R. Dickerson, *The Interpretation and Application of Statutes* 67, *et seq.* (1975)), that intent is often difficult to ascertain. See Justice

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One other governing principle should be noted at the outset. *Milliken* v. *Bradley*, 418 U. S. 717 (1974), in language we are not free to ignore, focused on the constitutional right to be vindicated. Amplifying the statement quoted by the majority that "the scope of the remedy is determined by the nature and extent of the constitutional violation," *id.* at 744, the Supreme Court said two pages later:

> "Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system. . . .
>
> "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit District to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so. The view of the dissenters, that the existence of a dual system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils, cannot be supported on the grounds that it represents merely the devising of a suitability flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either

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Powell's concurrence in *Keyes*, 413 U. S. at 217, 233-234. For this reason Justice Stevens, concurring in *Washington* v. *Davis*, observed that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume," and based his concurring vote, in a manner reminiscent of Justice Harlan's concurring opinion in *Hunter* v. *Erickson*, 393 U. S. 385, 393 (1969), on the objective indicia that the governmental action was grounded on neutral principle. In the case at bar, this problem is not as knotty as it often is. Uni-Gov satisfies the neutral principle standard, and the search for collective legislative intent, which able counsel must have made, seems to have turned up no evidence whatsoever of racially discriminatory purpose on the part of anyone responsible for the legislation. The housing siting decisions are in a similar posture.

> constitutional principle or precedent." *Id.* at 746-747 (footnote omitted).

That *Milliken* controls here, apart from the additional evidence on Uni-Gov and public housing, was of course recognized in our decision on the second appeal, in which we reversed the portion of the District Court's order calling for interdistrict relief outside the Uni-Gov territory. That decision was a recognition that, in the language of *Milliken*, "[t]he constitutional right of the Negro respondents residing in [IPS] is to attend a unitary school system in that district," *id.*, and an interdistrict remedy is not an appropriate means of vindicating that right. The question now is: What other constitutional rights, violation of which calls for an interdistrict remedy, were shown on remand to have been violated by Uni-Gov and the siting of public housing projects? The majority does not seem to me to answer that question.

The District Court did not find that the legislative decision to exclude IPS from Uni-Gov was racially motivated.[2] The record would not have supported such a finding in view of both the absence of any direct evidence of such a motivation and the presence of such evidence as the historic context of opposition to county-wide school consolidation on non-racial grounds,[3] the

2. Such a finding cannot be inferred from the District Court's statement that by not consolidating the schools under Uni-Gov, the General Assembly "signaled its lack of concern with the whole problem and thus inhibited desegregation with[in] IPS." Apart from doubt about whether there is any evidence that Uni-Gov had an inhibiting effect on desegregation, as distinguished from not promoting desegregation, the court has merely described an effect and not a purpose. A "lack of concern" does not amount to a racially discriminatory purpose. The state, like Michigan in *Milliken*, was under no direct constitutional duty to adopt interdistrict measures, and a duty to act could hardly arise from the fact that failure to act would "signal a lack of concern."

3. There is no evidence, as the majority recognizes, that the opposition to consolidation of Marion County School ditsricts under the Indiana School Reorganization Act of 1959 (Ind. Code § 20-4-1-1, *et seq.*), was racially motivated. Nor is there any evidence that the failure to consolidate after that time or opposition to civil annexation was racially motivated. The District Court, in the course

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decision to leave other government units out of Uni-Gov[4] the fact that all school boundaries elsewhere in the state were already frozen, and the non-racial reasons and the haphazard fashion in which civil annexation had taken place in the past, which had done nothing to establish rational school boundaries.[5] The appellees do not argue that the evidence shows a racially discriminatory purpose. In their briefs, filed before the decision in *Washington* v. *Davis*, the government assumes, and the intervening plaintiffs argue, that such a purpose need not be shown.

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of the hearing on remand after our decision on the second appeal, spoke of the purpose of certain exhibits as being offered "to prove or tend to prove that the present division of Marion County into eleven separate school districts is something that happened because of reasons pertaining primarily to school finances as well as to the desire of non-IPS schools to maintain local autonomy rather than for reasons of separating students based on race. . . .I presume that if the Government or the intervening plaintiffs had some evidence to the contrary that they would be cross-examining, or examining along those lines." [March 1975 Tr., Vol. III, pp. 359-360.] Neither the government nor the intervening plaintiffs offered any "evidence to the contrary" or cross-examined along the lines referred to.

4. Among those other governmental units were the Airport Authority, the Health and Hospital Corporation, the County Department of Welfare, the Building Authority, and the Library Districts. See Ind. Code § 18-4-3-14. The so-called "excluded cities" of Speedway, Perry and Lawrence retained their own local governments, which provide municipal services in those areas, although Uni-Gov has the responsibility even in those areas for air pollution regulation, building code enforcement, municipal planning, and thoroughfare control.

5. The record indicates that the reasons for this and the resulting irregularities in the boundaries of Indianapolis were that in many instances residents protested annexation because they felt the city would not provide them with services commensurate with the additional tax money they would be paying (not an uncommon reason for opposition to annexation by municipalities large and small throughout the country), and in other instances commercial developers sought and gained the annexation of land they owned because they wanted benefits that could be obtained through annexation. Thus whether this land was annexed depended in large part upon the position taken by the owners of the land affected. [March 1976 Tr., Vol. II, pp. 219-220.]

A search in the opinion of this court's majority for a finding of racially discriminatory purpose will be unproductive. The majority finds (text at notes 9 and 10) that the General Assembly did not want IPS boundaries to expand with the city boundaries whether or not Uni-Gov was adopted[6] but does not follow with a statement that this desire or the actions effectuating it were racially motivated. Instead it goes on to state, citing *Milliken*, that "Uni-Gov and its companion 1969 legislation were 'a substantial cause of interdistrict segregation' . . . and 'contributed to the separation of the races by . . . redrawing school lines . . . .'"[7] But under *Milliken*, as explained in *Washington* v. *Davis*, cause and effect are not enough. A racially discriminatory purpose is necessary. The closest the majority comes to finding a racially discriminatory purpose is in the abstract statement, at the end of the paragraph containing the three hypotheticals, that "a city should not be permitted to extend its boundaries in order to avoid desegregation." I believe that if this court intended to find as a fact that Uni-Gov was adopted with a racially discriminatory purpose, in the face of the failure of the District Court to find, and of the appellees to argue, that there was such a purpose, it would do so directly and state the evidentiary basis for that finding. As stated above, I believe there is no such basis in the record.

The majority attempts to avoid the necessity of finding discriminatory purpose by postulating an affirmative duty to desegregate under *Green* v. *County School Board*, 391 U. S.

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6. This inference is drawn from the adoption of Chapter 52, 1969 Acts (Ind. Code § 20-3-14-9) seven days before the adoption of Uni-Gov and the adoption of Chapter 239, 1969 Acts (Ind. Code § 18-5-10-25). The effect of these two acts was to eliminate the automatic expansion of IPS boundaries to match the expansion of city boundaries and to limit remonstrances against annexations. These acts were rendered nugatory by the adoption of Uni-Gov.

7. Failing to redraw the school district lines does not seem to me to be "redrawing school district lines," but this is not important to an analysis of the problem, because the controlling question is whether, however the legislature's action is described, it was taken with a racially discriminatory purpose.

430 (1968), and the Indiana statutes. It is doubtful that the Indiana legislature could impose on itself by statute the duty to pass additional statutes, and, if it could, violation of such a duty would not give rise to a federal constitutional claim. *Milliken's* teaching is that the state's constitutional duty under *Green* is commensurate with the violation, which, apart from the Uni-Gov events themselves, was a violation of the right to attend a unitary school system within IPS. Under *Milliken,* there can be no affirmative duty to use interdistrict means to remedy intradistrict violations; for if such a duty existed, the State of Michigan surely violated it in that case, which would have mandated the interdistrict remedy rejected by the Supreme Court, and there was no reason in the case at bar to exclude the territory outside Uni-Gov from the scope of our remand on the second appeal.

Evans v. *Buchanan*, 393 F. Supp. 428 (D. Del. 1975), *aff'd*, 96 S. Ct. 381 (1975), on which the majority relies, does not in my opinion support affirmance. That case, unlike the case at bar, involved a prior interdistrict violation mandating the adoption of interdistrict measures by state authorities. The district court opinion in *Evans* shows *de jure* segregation before *Brown* v. *Board of Education*, 347 U. S. 483 (1954), was practiced on an interdistrict basis in the Wilmington area. 393 F. Supp. at 437. The state failed to carry its burden of showing that these past acts of segregation had become so attenuated that "the current segregation is in no way the result of those past segregative actions," *Keyes* v. *School District No. 1, supra,* 413 U. S. at 211 n. 17; in fact, post-*Brown* acts contributed to continued interdistrict segregation, see 393 F. Supp. at 434-436. Consequently, there was an affirmative duty to remedy the interdistrict violation, and the Delaware reorganization statute, by barring consolidation as a way of doing so, "contravene[d] the implicit command of *Green* v. *County School Board* . . . that all reasonable methods be available to formulate an effective remedy." *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43, 46 (1971).

The majority relies on the "racial impact" theory espoused by the district court in *Evans*. The summary affirmance of the three-judge district court's judgment does not necessarily imply approval of that court's reasoning, and that reasoning clearly cannot stand after *Washington* v. *Davis*.

In short, there is no finding and no evidence that the exclusion of IPS from Uni-Gov was racially motivated, and by all objective criteria Uni-Gov was racially neutral state action. Uni-Gov left untouched the boundaries of IPS, which had been established for racially neutral reasons. The changes in civil boundaries and reallocations of civil governmental functions made by Uni-Gov had no effect on the constitutional rights of school children in IPS.

Public Housing

The District Court, while unconvinced by the reasons given for the selection by the Housing Authority of certain sites near the periphery of the City of Indianapolis, made no findings that any of the Housing Authority's decisions were racially motivated. As the majority notes, under federal statute (42 U. S. C. § 1415(7)(b)(i)) and HUD guidelines, the Housing Authority could not obtain federal funds for a project in the absence of a cooperation agreement with the local governmental authority obligating the latter to provide essential governmental services; and as the District Court found, "Suburban Marion County officials have refused to cooperate with HUD on the location of such projects." It is apparent from the record and the District Court's findings that this was the real reason housing projects were built only within the City of Indianapolis before the effective date of Uni-Gov. There was no finding and no evidence that the refusals were racially motivated. Failure of local authorities to enter into these agreements, without more, does not give rise to an inference of racially discriminatory purpose, even though the projects are to be occupied by large numbers of blacks. See *James* v. *Valtierra, supra,* 402 U. S. at 141; see also *Metro-*

politan Housing Development Corp. v. *Village of Arlington Heights*, 517 F. 2d 409, 412-413 (7th Cir. 1975), *cert. granted*, 96 S. Ct. 560 (1975). As these cases hold, the state's location of low-rent housing projects for racially neutral reasons, even though it has a disparate effect on minority groups, is not subject to strict scrutiny. *James* v. *Valtierra, supra*, 402 U. S. at 141; *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights, supra*, 517 F. 2d at 413.[8] As the majority notes, the record is silent as to why no housing projects were commenced within IPS since the effective date of Uni-Gov. Absent a showing of discriminatory intent, I find no ground on which to sustain the injunction against the Housing Authority.

Relief

In the absence of an interdistrict violation, there should be no interdistrict relief against the school corporation defendants. If I believed the majority were correct in finding interdistrict violations, I would agree that the remedy ordered by the District Court is within its discretion and would not have this court substitute its discretionary judgment for that of the District Court

8. The majority does not rely on other acts of the state and private parties that had the effect of confining blacks to the IPS area, to which the brief of the United States refers. These acts which include recording racial covenants, disciriminatory FHA loan practices and private discrimination by brokers, sellers, and others, were referred to by the District Court as "customs and usages of both the officials and inhabitants of such areas" which "discourage[d] blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court." While the District Court was no doubt correct in this statement, the findings referred to and the evidence supporting it were all in the record at the time of the last appeal, when we held that *Milliken* precluded relief outside Marion County, and are similar to findings and evidence in *Milliken*. See 418 U. S. at 724, 728 n. 7. If these facts had sufficed to justify an interdistrict remedy, the Supreme Court in *Milliken* would presumably either have affirmed on the familiar principle that a reviewing court will affirm on any basis supported by the record, even if not relied on by the lower court, or else would have remanded for further consideration of the housing issue. See, *e.g., Dandridge* v. *Williams*, 397 U. S. 471, 475 n. 6 (1970).

by ordering only the voluntary-transfer remedy urged by the government. In this connection, I do note that even when no constitutional violation has occurred, Indiana law provides relief to a student who is prevented by school district lines from attending the school nearest his home, Ind. Code § 20-8.1-6-1, *et seq.*, and the school authorities seem to be obligated to grant such relief, *State ex rel. Smitherman* v. *Davis*, 283 Ind. 563, 571, 151 N. E. 2d 495, 498 (1958).

I further believe that since the Housing Authority, unlike HUD in *Hills* v. *Gautreaux*, 44 U. S. L. W. 4480 (U. S. April 20, 1976), has not been found to have engaged in purposefully discriminatory and therefore unconstitutional conduct, no relief against that agency is warranted.

UNITED STATES DISTRICT COURT,
Southern District of Indiana,
Indianapolis Division.

No. IP 68-C-225.

UNITED STATES OF AMERICA,

Plaintiff,

DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Intervening Plaintiffs,

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; KARL R. KALP, as Superintendent of Schools; MARTHA McCARDLE, as President of The Board of School Commissioners; WILLIAM M. S. MYERS, CARL J. MEYER, PAUL E. LEWIS, LESTER E. NEAL, CONSTANCE R. VALDEZ, W. FRED RATCLIFF, Members of The Board of School Commissioners of the City of Indianapolis,

Defendants,

OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN

TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body;

Added Defendants.

CITIZENS FOR QUALITY SCHOOLS, INC.;

Intervening Defendant,

COALITION FOR INTEGRATED EDUCATION;

Amicus Curiae.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA,

Cross-Claimants,

vs.

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

Cross-Defendants.

MEMORANDUM OF DECISION.

This case comes before the Court for further hearing, pursuant to the direction of the Court of Appeals for the Seventh Circuit. 503 F. 2d 68 (1974) cert. den. ..... U. S. ....., 43 USLW 3571 (April 21, 1975). The previous history of the case, and of various related actions, is fully set out at 503 F. 2d 71-75, and will not be repeated here. The names of certain defendants sued in a representative capacity, and whose terms have expired, have been deleted and their successors substituted.

This Court was specifically directed to determine whether the establishment of the Uni-Gov boundaries of the City of Indianap-

olis[1] without a like re-establishment of Indianapolis Public Schools boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken* v. *Bradley*, 418 U. S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974). Pursuant to such direction, a further evidentiary hearing was held, beginning March 18, 1975, and the parties have submitted both oral argument and briefs, all of which have been considered. The Court has also given consideration to other matters raised by the pleadings and evidence, and to matters of Indiana Law, all as will more fully appear.

The defendant Board of School Commissioners (IPS) on September 29, 1971, brought into the case as additional defendants, The Metropolitan Development Commission of Marion County (Commission) and The Housing Authority of the City of Indianapolis (HACI), and by way of a cross-complaint charged them with implementing policies which contributed to the segregation of IPS. Declaratory relief was demanded. These issues were not taken up heretofore, but in its pretrial entry of December 13, 1974 the Court ruled that, in addition to the Uni-Gov issue, the issue of the effect, if any, of the housing and zoning laws, rules, regulations and customs in Marion County, Indiana and its various political subdivisions upon the de jure segregation of IPS, would be considered. The greater part of the evidence introduced at the March hearing was on the latter subject.

The issue regarding housing and zoning laws was not mooted by *Milliken*. To the contrary, the concurring opinion of Mr.

1. The boundaries of the city, pursuant to Uni-Gov, are co-extensive with the boundaries of Marion County, except that the cities of Beech Grove and Lawrence ("excluded cities") and the unincorporated town of Speedway ("excluded town") are permitted to carry on as separate municipal corporations within the territory of the consolidated City of Indianapolis. Citizens of these communities have a dual status—for example, a Beech Grove voter may vote for Mayor of Indianapolis, members at large of the City County Council, Mayor of Beech Grove, and city councilmen of Beech Grove.

Justice Stewart, which constituted the decisive vote as between an otherwise evenly balanced Court, stated, "Were it to be shown . . . that state officials had contributed to the separation of the races by drawing or redrawing school district lines . . .; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate." 418 U. S. at 755.

The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI is located within IPS territory, in some instances just across the street from territory served by one of the added defendant school corporations. Each of such locations was approved—in some instances selected in the first place—by the added defendant Commission. The latter institution has had county-wide zoning jurisdiction at all times during the construction of 10 out of the 11 public housing projects for families, and HACI has at all times had the authority to erect public housing within the City of Indianapolis, and within five miles of the corporate limits of such city. The residents of said public housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.

The evidence in the record, as taken in all hearings, clearly shows that the suburban Marion County units of government, including the added defendant school corporations, have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban

Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court.

In its most recent opinion, 503 F. 2d at 80, the Court of Appeals specifically concluded, with this Court, that state officials of the State of Indiana "have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries. . . ." Inasmuch as certiorari has been denied by the Supreme Court, the finding that the State has promoted segregation and inhibited desegregation within IPS is, quite obviously, the law of the case. The new findings of this Court that the Commission and HACI have been guilty of such acts simply amplifies such earlier findings. The action of these agencies in confining poor blacks to the inner city has directly and proximately contributed to cause the suburban school districts within Marion County, other than Washington Township and Pike Township, to be and remain segregated white schools, with segregated white faculties and administrative staffs.

The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons. However, the General Assembly of Indiana, with its members elected on a state-wide basis, was not, or should not have been, subservient to local pressures, and undoubtedly could have legislated a county-wide school system for Marion County as easily as it legislated a county-wide civil government. Under existing law, both Federal as expressed in *Brown* v. *Board of*

Education, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), and in *Green* v. *County School Board*, 391 U. S. 430, 88 S. Ct. 1689, 20 L. Ed. 716 (1968), and the law of Indiana as expressed in Acts 1949, Ch. 186, p. 603, Burns Ind. Stat. Ann. §§ 28-6106 - 28-6112 (1970), it had a duty to alleviate the segregated condition then existing in IPS. When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with IPS.

The Court finds that the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited inter-district remedy within all of Marion County, Indiana, as hereafter described.

Recently, the General Assembly has taken steps to meet its duty under the law—specifically by passing P. L. 94 of the Acts of 1974, Burns Ind. Stat. Ann. §§ 28-5031 - 28-5040, I. C. 1971, 20.-8.1-6.5-1, et seq., as added 1974. The Court of Appeals in its opinion at 503 F. 2d 74 refers to this statute as "rigidly limited in its application," which may well be, but in any event it does expressly recognize the power both of United States district courts and of the courts of the State to make orders regarding the transfer of pupils from one school corporation to another if certain conditions be found to exist, and affords a State policy and means for paying the costs of such inter-district relief, all of which was lacking in *Milliken*.

Specifically, the statute provides a means and method whereby a transferor school corporation may pay a transferee school corporation for the cost of education of a pupil transferred from the one to the other in compliance with a court order issued under the following conditions:

(1) In a suit where the transferor or transferee corporation or corporations are parties, the Court must have found the following:

(a) A transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders;

(b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor corporation; and

(c) The Fourteenth Amendment compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

In the case at hand, we have a suit in which all of the school corporations in Marion County, Indiana are parties, and in which this Court has made, and now reiterates, the following findings:

(a) The defendant Board of School Commissioners of Indianapolis, Indiana (IPS) has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders. *United States* v. *Board of Sch. Com'rs, Indianapolis, Ind.*, 332 F. Supp. 655 (S. D. Ind. 1971), aff'd 474 F. 2d 81 (7 Cir.), cert. den. 413 U. S. 920, 93 S. Ct. 3066, 37 L. Ed. 1041 (1973).

(b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of IPS. "In the long haul, it won't work." 332 F. Supp. at 678.

This Court found as a fact in its opinion of July 20, 1973, 368 F. Supp. 1197, et seq., that within the IPS boundaries resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or less. That finding has not been challenged by anyone. Therefore, in a school corporation in which the percentage of black pupils has now reached more than 42% over all, and with the Court of Appeals having ordered this Court

to take further steps to desegregate the same, 503 F. 2d 80, the Court is placed in an impossible situation unless the transfer for education of a substantial number of black IPS pupils to school corporations other than IPS is accomplished.

The Court therefore makes the following additional finding:

(c) The Fourteenth Amendment compels the Court to order IPS to transfer a substantial number of its black students to various added defendant school corporations for education in order to effect a plan of desegregation in the tranferor corporation which is acceptable within the meaning of such amendment.

The Court of Appeals has called the attention of this Court to the rule of law that "white flight" is not an acceptable reason for failing to dismantle a dual school system. 503 F. 2d 80, citing *United States* v. *Scotland Neck City Board of Education*, 407 U. S. 484, 491, 92 S. Ct. 2214, 2218, 33 L. Ed. 2d 75 (1970). However, it does not follow that this Court must ignore the probability of white flight in attempting to formulate guidelines for IPS to follow in accomplishing the final desegregation of its schools. In other words, as this Court sees it, white flight may not be used as an excuse for inaction; it may, however, supply the reason for a particular kind of action.

Tihs approach requires the Court, once again, to review applicable statistics. "The Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy . . ." *North Carolina Bd. of Ed.* v. *Swann*, 402 U. S. 43, 91 S. Ct. 1284, 28 L. Ed. 586 (1971).

For the school year 1974-75, there were 77,732 pupils enrolled in IPS, excluding kindergarten and special education students. Of these 44,756, or 57.57%, were white and 32,976, or 42.43%, were black. Virtually all schools had an enrollment of at least 15% black pupils, and 19 elementary schools and one high school had enrollments in excess of 80% black. As

the Court understands the order of the Court of Appeals, this group of 20 schools must be further desegregated. As stated above, this Court has previously found that to require all schools to enroll about 42.43% black pupils would immediately accelerate white flight and unbalance the entire system beyond saving. The Court respectfully declines to stultify itself by giving any such direction.

The Metropolitan School Districts of Washington Township and Pike Township are integrating rather rapidly, as a result of demographic changes, so that Washington had a black percentage of approximately 15% and Pike a black percentage of approximately 12% for the past school year. These percentages seem likely to increase for the coming year. If the percentage of black students in the other suburban districts within Marion County were equivalent to that of Washington Township, approximately 9,525 black students would need to be transferred to such districts. The Court finds that the Fourteenth Amendment compels it to order IPS to transfer, and for the added defendant school corporations, other than Pike and Washington, to receive approximately such number of black students, over a period of time, in order to effect a plan of desegregation within IPS which is acceptable within the meaning of such amendment.

Transfers shall not include kindergarten nor special education students, and such students shall not be counted for the purpose of determining the number of transferees to each school corporation. Further, for the school year 1975-76, transfers will be limited to students in grades 1-9, inclusive, for a total of about 6,533 students, with the understanding that a student once transferred to a suburban school corporation will continue in such corporation until graduation from high school, unless the residence of such student is moved from IPS.

The number of students to be transferred to a particular school corporation shall be in such number as to cause the total enrollment of pupils in such school corporation, after the transfers have been accomplished, to be approximately 15% black. As an example, Beech Grove City Schools for the school year

1974-75 had an all white enrollment of 1,865 in grades 1-9, excluding special education. The 1,865 should be 85% of the school population after transfer; therefore 1% would be 21.9411, and 15% would be 15 x 21.9411 or 329. Approximately 329 black students would be transferred from IPS to Beech Grove in grades 1-9 for the coming school year. For the ensuing years, the original transferees would continue in the Beech Grove schools, and a new first grade group in an appropriate number would be transferred. Transfers by grade should be proportionate to the number of students enrolled per grade in the transferee schools for the past school year. Fortunately, the reports on classroom space filed by the added defendants reflects that, without exception, there is ample space available in which to house the transferees; also, IPS has ample transportation facilities available.

It is possible that transfers of black students to Washington Township should be made for education at the J. Everett Light Career Center; ruling on this point is reserved pending clarification as to certain statistical information in the record.

With regard to the present transfer of pupils, as above described and as will be more particularly set out in an accompanying order and judgment, the respective superintendents of the transferee school corporations involved, or their nominees, are directed to meet with the superintendent of IPS, or his nominees, forthwith in order to work out the exact names, numbers, and grades of pupils to be transferred. Reasonable deviations from exact statistical scheduling are anticipated, and may be agreed upon, subject to the approval of the Court. Disagreements, if any, shall be promptly referred to the Court for resolution. The transfers shall be effective, and transfer of pupils shall begin on the first day of the 1975-76 school year at each of the various transferee schools.

Once the transfer pupils have been identified, the defendant IPS is directed to submit to the Court a final plan for desegregation of the remaining schools within IPS. Alternate plans may

be submitted, in the discretion of IPS. Such plan or plans shall consider the high schools, as well as elementary schools. Kindergarten students and special education students need not be taken into account in computing black-white ratios in the various schools. Such plan or plans shall be submitted on or before October 15, 1975 and, if one be approved, it shall be put into effect at the beginning of the second semester of the 1975-76 school year, except as the Court may otherwise order.

As previously found, the location by HACI of all of its public housing facilities within IPS territory has had a major influence toward keeping black students confined within IPS, while at the same time keeping the suburban school systems virtually all white. Such conduct should and will be enjoined, so as to prohibit HACI from locating any additional public housing units within the boundaries of IPS. Furthermore, HACI should and will be enjoined from reopening Lockefield Gardens, a public housing project which is now vacant, to tenants other than the elderly.

The case for the intervening Buckley plaintiffs and their class was filed and has been presented by John O. Moss and John Preston Ward. The Court previously found them entitled to recover their reasonable attorneys fees and expenses, pursuant to 20 U. S. C. § 1617, but no fees have as yet been awarded, and the Court of Appeals has requested a further finding on the issue. 503 F. 2d 86. It is the Court's opinion that the Buckley plaintiffs should be regarded as the "prevailing parties," within the meaning of such statute, if the rulings of this Court relating to transfer of pupils become final, since they are the only parties who have contended for a remedy going beyond the IPS strait jacket.

Orders will be entered in accordance with this memorandum.

Dated this 1st day of August, 1975.

/s/ S. HUGH DILLIN,
S. Hugh Dillin,
Judge.

UNITED STATES DISTRICT COURT,
Southern District of Indiana,
Indianapolis Division.

* * (Title Omitted in Printing) * *

JUDGMENT.

The Court having this day filed a memorandum of decision in the above entitled action (Indianapolis IV), containing various findings requiring orders and judgments, such orders and judgments are hereinafter set out.

Recognizing that some or all of the parties to this proceeding may wish to appeal the judgments entered herein by this Court as to them, and as a convenience to all parties, this Court will designate by separate subnumber that particular judgment directed against each particular defendant or defendants, in order that the parties appealing may properly designate in any notice of appeal filed herein that particular judgment or judgments so appealed. The defendant The Board of School Commissioners of the City of Indianapolis, Indiana will be referred to as "IPS."

a. IP 68-C-225A. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Decatur Township, Marion County, Indiana, 567 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

b. IP 68-C225B. It is ordered and adjudged that IPS is directed to transfer to The Franklin Township Community

School Corporation, Marion County, Indiana, 326 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

c. IP 68-C225C. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Lawrence Township, Marion County, Indiana, 930 negro students to be enrolled in grades 1-9 for the 1975-76 school years, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

d. IP 68-C-225D. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Perry Township, Marion County, Indiana, 1,555 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

e. IP 68-C-225E. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Warren Township, Marion County, Indiana, 1,206 negro students to be enrolled in grade 1-9 for the 1975-76 school year,

and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

f. IP 68-C-225F. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Wayne Township, Marion County, Indiana, 1,383 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

g. IP 68-C-225G. It is ordered and adjudged that IPS is directed to transfer to the School City of Beech Grove, Marion County, Indiana, 329 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

h. IP 68-C-225H. It is ordered and adjudged that IPS is directed to transfer to the School Town of Speedway, Marion County, Indiana, 237 negro students to be enrolled in grades 1-9 for the 1975-76 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the Court. Said transferee school corporation is ordered

to accept such transfer students and enroll them accordingly. All of the foregoing shall be accomplished in accordance with the applicable provisions of said Memorandum of Decision, which are incorporated in this subparagraph as if set forth herein.

i. IP 68-C-225I. It is ordered and adjudged that IPS prepare and file with the Court, on or before October 15, 1975, a plan, or alternative plans, for the final desegregation of its schools, taking into account the transfer of pupils ordered herein.

j. IP 68-C-225J. It is ordered and adjudged that The Housing Authority of the City of Indianapolis be, and it is permanently enjoined from constructing or in any manner acquiring any structure within the area served by IPS for the purpose of offering the same, or any parts or portions thereof, for rent as a family type public housing project.

k. IP 68-C-225K. It is ordered and adjudged that The Housing Authority of the City of Indianapolis be, and it is permanently enjoined from renovating its presently owned public housing project known as Lockefield Gardens for use as a family type public housing project, or to utilize the same, or any parts or portions thereof, for such purpose. Nothing herein contained shall be construed as enjoining the use of such structure for public housing for the elderly.

The Court retains continuing jurisdiction of this action, and the parties thereto, together with the right to modify or supplement any orders or judgments herein or heretofore made.

Dated this 1st day of August, 1975.

/s/ S. HUGH DILLIN,
S. Hugh Dillin,
Judge.

APPENDIX B.

JUDGMENT SOUGHT TO BE REVIEWED.

Opinion by Judge Swygert
(Judge Tone dissenting)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 16, 1976

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* DONNY BRURELL BUCKLEY, et al., etc., *Intervening Plaintiffs-Appellees,* Nos. 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965, and 75-2007 *vs.* BOARD OF COMMISSIONERS OF CITY OF INDIANAPOLIS, INDIANA, et al., *Defendants-Appellants.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP-68-C-225 S. Hugh Dillin, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C.

NOTICE OF APPEAL.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

(Filed U. S. C. A.—7th Circuit, July 26, 1976,
Thomas F. Strubbe, Clerk)

* * (Caption Omitted in Printing) * *

NOTICE OF APPEAL BY THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA.

Notice is hereby given that The Metropolitan School District of Perry Township, Marion County, Indiana, added defendant-appellant, hereby appeals to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Seventh Circuit, entered on July 16, 1976, which held that Chapters 52, 173 and 239 of the 1969 Acts of the Indiana General Assembly were "a substantial cause of interdistrict segregation" and a violation of the Equal Protection Clause of the Fourteenth Amendment.

This appeal is taken pursuant to 28 U. S. C. § 1254(2).

/s/ DONALD A. SCHABEL,
Donald A. Schabel,
Attorney for Added Defendant-Appellant The Metropolitan School District of Perry Township, Marion County, Indiana.

BUSCHMANN, CARR & SCHABEL,
111 Monument Circle, Suite 1200,
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APPENDIX D.

STATUTES INVOLVED.

CHAPTER 186.

[H. 206. Approved March 8, 1961.]

AN ACT concerning school corporations.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. As used in this act, the following terms shall have the following meanings:

(a) "School corporation" shall be any public school corporation of the state located in whole or in part in a county containing a civil city of the first class.

(b) "School city" shall refer to any school corporation which at any time is a school city or school town or has succeeded to jurisdiction of all or the major part in area of a school city or school town.

(c) "Civil city" shall refer to any civil city or civil town, the area of which, or the major portion of the area of which, is under the jurisdiction of a school city.

(d) "Annex," "annexing," "annexation" and "school annexation" shall refer to any action whereby the boundaries of any school corporation are changed so that additional territory, constituting all or a part of any one or more other school corporations, is transferred to it.

(e) "Civil annexation" shall refer to any action whereby the civil boundaries of any civil city are extended.

(f) "Acquiring school corporation" shall be the school corporation which acquires territory as a result of annexation.

(g) "Losing school corporation" shall be any school corporation which loses territory to an acquiring school corporation by annexation.

(h) "Annexed territory" shall be the territory acquired by an acquiring school corporation as a result of annexation from a losing school corporation.

(i) "Resolution" of a school township shall refer to a resolution adopted by the trustee and a majority of the advisory board, and of any other school corporation shall refer to a resolution duly adopted by its governing body.

SEC. 2. Subject to the limitations and procedure set out in this act, any school corporation may annex territory from any other school corporation by resolutions of the acquiring and losing school corporations as provided in Section 3, and any school city may annex territory from any other school corporation by its single resolution as provided in Section 4.

SEC. 3. An annexation may be effected by any school corporation as follows:

(a) Both the acquiring and the losing school corporations shall each adopt a substantially identical annexation resolution. This resolution shall contain the following items:

(1) A description of the annexed territory. Such description shall as near as reasonably possible be by streets and other boundaries known by common names and need not be in addition by legal description unless such additional description is necessary to identify the annexed territory. No notice shall be defective if there is a good faith compliance with this section and if the area designated may be ascertained with reasonable certainty by persons skilled in the area of real estate description.

(2) The time the annexation takes place. This may vary with respect to the different parts of the annexed territory; and if the entire annexed territory is contiguous to the acquiring corporation the parts of the annexed territory may be annexed so that some parts may not be contiguous to the annexed territory for temporary periods.

(3) Any terms and conditions facilitating education of pupils in the annexed territory, in the losing school corporation

or in the acquiring school corporation. Such terms may provide for, but shall not be limited to, the continued attendance by children in the annexed territory at schools in the losing school corporation for specified periods of time after annexation on a transfer basis. In such instances transfer tuition for such children shall be paid by the acquiring school corporation to the losing school corporation in the manner and at the rates now or hereafter provided by the statutes of the State of Indiana governing the computation and payment of transfer tuition costs.

(4) Disposition of assets and liabilities of the losing school corporation to the acquiring school corporation; allocation between the acquiring and losing school corporations of subsequently collected school taxes levied on property in the annexed territory; and the amount, if any, to be paid by the acquiring school corporation to the losing school corporation on account of property received from the latter. Such disposition, allocation, and amount shall be equitable.

(b) After the adoption of such resolution, notice shall be given by publication in both the acquiring and the losing school corporations setting out the text of the resolution, together with a statement that such resolution had been adopted and that a right of remonstrance exists as provided herein. It shall not be necessary to set out the remonstrance provisions of the statute, but a general reference to a right of remonstrance with a reference to the act shall be sufficient. The annexation shall take effect within thirty (30) days after such publication, or at the time provided in the resolution, whichever is later, unless within such period a remonstrance (based on a ground other than that set out in Section 6(a)(5) of this act) is filed in the circuit or superior court of the county where the annexed territory or any part thereof is located, by registered voters residing in the losing school corporation at least equal in number to the greater of the following: (a) ten per cent (10%) of the number of registered voters residing in the losing school corporation or (b) fifty-one per cent (51%) of the number of registered voters residing in the annexed territory.

SEC. 4. An annexation may also be effected by any school city as follows:

(a) The acquiring school corporation shall adopt an annexation resolution of the type provided in Section 3. Unless the losing corporation shall consent, such resolution shall not provide a time for annexation prior to the July 1st succeeding the May 1st next succeeding the last publication of the notice of annexation.

(b) After the adoption of such resolution, the acquiring school corporation shall give notice of the type provided in Section 3 by publication in the acquiring school corporation and in the losing school corporation. It shall also give notice to the losing school corporation prior to the last publication of notice therein. The annexation shall take effect thirty (30) days after the last such publication in the losing school corporation or at the time provided in such resolution whichever is later, unless within such a period of remonstrance (based on a ground other than that set out in Section 6(a)(5) of this act) is filed in the circuit or superior court of the county where the annexed territory or a part thereof is located, by the losing school corporation, by not less than a majority of the owners of land in the annexed territory, or by the owners of seventy-five per cent (75%) or more in assessed valuation of the real estate in the annexed territory.

(c) For purposes of determining such ownership, the following rules shall apply: Only the record title holder or holders of any piece of property shall be an owner. Where record title of any single piece of property is in more than one person, all of them together shall constitute only one owner, and the remonstrance of any one of them shall constitute the remonstrance of all, whether or not authorized by the others.

SEC. 5. (a) The notice by publication required by Sections 3 and 4 shall be made two (2) times a week apart in two (2) daily newspapers of general circulation, published in the English language and of general circulation in the acquiring school

corporation and in the losing school corporation. Where there is only one or no such daily newspaper in either such school corporation, a weekly newspaper or newspapers may be used. Where there is only one such daily and/or weekly newspaper, publication in such paper shall be sufficient. Where any newspaper is of general circulation in both corporations, any publication in such newspaper shall qualify as one of the required publications in each of the school corporations. Publication may be made jointly by the losing and acquiring school corporations. The remonstrance period shall run from the second such publication.

(b) Where notice is to be given by an acquiring to a losing school corporation, it may be made either by registered or certified United States mail, return receipt requested, addressed to the governing board of the losing school corporation at its established business office, or addressed to the township trustee in the case of a school township, or addressed to the superintendent of schools or any officer of the governing body of any other school corporation.

SEC. 6. (a) A remonstrance under either Sections 3 or 4 of this act shall be in the following or a substantially similar form:

The undersigned hereby remonstrate against the annexation of the following described territory situated in ..... County, Indiana, whereby it would be transferred from ..... (the losing corporation) to ..... (the acquiring corporation):

(Description of the annexed territory sufficient to identify it.

The remonstrance may be filed in any number of counterparts. Each counterpart shall have attached to it the affidavit of the person circulating it that each signature appearing thereon was affixed in his presence and is the true and lawful signature of the person who made it. The person who makes such affidavit need not be one of the persons who signs the counterpart to

which it is attached. Such remonstrance shall be accompanied by a complaint filed by one or more of the remonstrators (who shall be treated as a representative of the entire class of remonstrators), and signed by such remonstrator or his attorney, stating the reasons for the remonstrance. Such reasons shall be limited to the following:

(1) There is a procedural defect in the manner in which the annexation is carried out which is jurisdictional.

(2) The annexed territory does not form a compact area abutting the acquiring corporation.

(3) The losing school corporation is left with no high school facilities, or its enrollment after annexation will be less than one thousand (1,000) pupils; provided, however, that such reasons for remonstrance shall not apply in a situation where the annexation includes all of the territory of the losing school corporation.

(4) The benefits to be derived from the annexation are outweighed by its detriments, taking into consideration the respective benefits and detriments to the schools and of the pupils residing in the acquiring school corporation, the losing school corporation, and the annexed territory.

(5) The disposition of assets and liabilities of the losing corporation, the allocation of school tax receipts between the two school corporations and the amount to be paid by the acquiring school corporation as set out in the annexation resolution are inequitable.

Except with respect to item (1), such allegations may be made in the statutory language.

(b) The plaintiff in such suit shall be the person whose name appears on the complaint and may be the losing school corporation in a remonstrance under Section 4. The defendants in a remonstrance under Section 3 shall be both the acquiring and the losing corporations; and in a remonstrance under Section 4 shall be the acquiring school corporation. Service of process shall be made on the defendants as in other civil actions.

(c) For the purposes of determining whether the petition was timely filed: the time of filing shall be the time of filing with the clerk without regard as to the time of issuance of the summons; where the 30th day falls on Sunday, a holiday or any other day when the clerk's office is not open, the time shall be extended to the next day when such office is open.

(d) The issues in any remonstrance suit shall be made up by the complaint, the allegations thereof being deemed denied by each defendant. No responsive pleading need or may be filed except that any defendant may where appropriate file a motion to dismiss the suit on the ground (1) that the requisite number of qualified remonstrators have not signed the petition, (2) that the remonstrance was not timely filed, or (3) that the complaint does not state a cause of action. No responsive pleading to this motion need or may be filed. With respect to a motion under (1) and (2), the allegations thereof shall be deemed denied by the remonstrators. For purposes of determining whether there are the requisite number of qualified remonstrators, no person shall be entitled to withdraw his name after a remonstrance has been filed nor shall any person be entitled to add his name to such remonstrance. Any person may, however, at the trial of such cause and in support or derogation of the substantive matters in the complaint, introduce into evidence a verified statement that he wishes his name added to or withdrawn from the remonstrance. The court may either hear all or a part of the matters raised by the motion to dismiss separately or may consolidate for trial all or a part of such matters with the matters relating to the substance of the case. No complaint shall be dismissed for failure to state a cause of action, if a fair reading of the complaint makes out one of the grounds for remonstrance and suit provided in subsection (a) above. Amendment of the complaint may be permitted in the discretion of the court if it does not state a new ground for remonstrance.

(e) The trial of a remonstrance suit shall be conducted as other civil cases by the court without the intervention of a

jury on the issues raised by the complaint and/or motion to dismiss. A change of venue from a judge, but no change of venue from the county, will be permitted. The court will expedite the hearing of the case. Its judgment, except with respect to any matter raised under subsection (a)(5), shall be either (1) that the annexation shall take place, (2) that the annexation shall not take place, or (3) that the remonstrance shall be dismissed. In the event the court finds that the remonstrators have proved the reasons for the remonstrance described in any one of the first four numbered reasons for remonstrance under subsection (a), its judgment shall be that the annexation shall not take place; unless they have proved one of such four numbered reasons, its judgment shall be that the annexation shall take place. With respect to any matter raised under subsection (a)(5), its judgment may be either that the disposition, allocation and amount set out in the annexing resolution is equitable or that it is inequitable. In the latter event the court in its judgment shall provide for an equitable disposition allocation and amount. Costs shall follow judgment. Appeals may be taken from any judgment of the court in the same manner as appeals are taken in other civil cases.

SEC. 7. With respect to whether the disposition of the assets and liabilities of the losing school corporation, allocation of school tax receipts and the amount to be paid by the acquiring school corporation is equitable, the court shall be satisfied that the annexing resolution conforms substantially to the following standards:

(a) The acquiring school corporation shall assume a portion of all installments of principal and interest on any indebtedness of the losing school corporation (other than current obligations or temporary borrowing) which fall due after the end of the last calendar year in which the losing school corporation is entitled to receive current tax receipts from property tax levies on the property on the annexed territory. Such portion shall consist of the following: (1)

all such installments relating to any indebtedness incurred in connection with the acquisition or construction of any building located in the annexed territory, and (2) a proportion of all such installments relating to any other indebtedness which is the same proportion as the valuation of the real property in the annexed territory bears to the valuation of all the real property in the losing school corporation, as the same is assessed for general taxation immediately prior to annexation.

(b) The acquiring school corporation shall make the payments and assume the obligations provided for a school corporation acquiring territory and/or building or buildings under Chapter 264, Acts 1953.

(c) Unless the losing school corporation shall consent to some other allocation: the portion of the special school and tuition fund monies collected by the losing school corporation shall not be allocated in a greater amount to the acquiring school corporation than would be awarded if such two corporations were respectively the "original school corporation" and the "annexing school corporation" within the meaning of Chapter 112, Acts 1957 as heretofore amended; and the amount to be paid the losing corporation by the acquiring school corporation on account of the acquisition by the acquiring school corporation of a building in the annexed territory shall not be less than would be awarded if such two school corporations were respectively the "acquiring corporation" and "original school corporation" within the meaning of Chapter 89, Acts 1959.

(d) Where the annexed territory includes all of any losing school corporation, the acquiring school corporation shall acquire all of the property and assets of the losing school corporation without making payment of any nature for the same and shall assume all of the liabilities and obligations of the losing school corporation.

SEC. 8. (a) In the event any remonstrance is filed on any ground other than that set forth in Section 6(a)(5),

annexation shall not become effective until final judgment in the remonstrance suit. Judgment shall not be considered to be final until the time for taking an appeal has expired, or, if an appeal is taken within such time, until final judgment in the appeal. A judgment of the trial court dismissing a remonstrance shall be considered to be a final judgment, subject to the provisions of the preceding sentence. In the event such judgment is against the annexation, no further annexation of the annexed territory may take place for a period of two (2) years from the date such remonstrance was filed. This shall not, however, prevent either the acquiring or the acquiring and losing school corporations from rescinding the annexation resolution; and in such event the suit shall be dismissed without prejudice. In such latter event such two (2) year prohibition shall not apply unless a subsequent annexation resolution is adopted primarily for the purpose of harassment and not for some other purpose, such as the correction of procedural irregularities or a substantial change in the annexed territory and/or the annexation resolution.

(b) Where the remonstrance relates solely to any matter raised under Section 6(a)(5) the annexation shall take effect at the time provided under Sections 3 or 4.

SEC. 9. (a) Whenever the boundaries of any civil city are extended by a civil annexation which becomes effective as of a date subsequent to the effective date of this act, the boundaries of the school city which has jurisdiction over the area of such civil city or the major portion thereof shall be correspondingly extended by virtue of such civil annexation, subject only to the further provisions of this Section. Every such extension of the boundaries of a school city shall become finally effective on the occurrence of that one of the three following events that is the first to occur:

(i) The expiration of that period of time within which, under the provisions of Section 243, Chapter 129, Acts 1905,

as amended, an appeal from the civil annexation may be filed, if, within such period, no such appeal is taken.

(ii) The expiration of that period of time within which, after the circuit or superior court in which there has been filed an appeal from the civil annexation has decided such appeal adversely to the remonstrator or remonstrators, an appeal from such decision of the circuit or superior court may be taken by the losing party, if, within such period, no such appeal from such decision of the circuit or superior court is taken.

(iii) If an appeal from such decision of the circuit or superior court is taken, the rendition of a final judgment adverse to the remonstrator or remonstrators, in the appeal. The date as of which, under the foregoing provisions of this Section, a civil annexation becomes finally effective to extend the boundaries of a school city shall also be deemed to be the date of "annexation," the "time of annexation," or the date on which "annexation occurs," whenever the determination of such date or such time shall be required for the application of any of the provisions of Chapter 112, Acts 1957, as amended, or of Chapter 89, Acts 1959, as amended.

(b) Whenever after the effective date of this act the governing body of a civil city shall adopt an ordinance effecting such a civil annexation as is described in Section 9(a) of this act, the losing school corporation shall have the right, notwithstanding any agreement signed by it under Section 7, Chapter 160, Acts 1953, or any similar agreement to remonstrate against, and appeal from, such civil annexation under the provisions of Section 243 of Chapter 129, Acts 1905, as amended. Such right shall be exercised in the same manner as the right to remonstrate and appeal given by said Section to the owners of real estate in the annexed territory. In the event a losing school corporation shall exercise the right of appeal hereby given, but only in such event, the following additional condition shall be a primary determinant of the

annexation's merit and shall be the only determinant to be considered by the court with reference to the merit of the remonstrance of the losing school corporation:

The benefits to be derived from the annexation outweigh the detriment, (including but not limited to the benefits and detriments to schools and educational welfare), taking into consideration the respective benefits and detriments to the residents of the civil city, the school city, the losing school corporation, and the annexed territory. If the judge of the court shall find that such primary determinant does not apply to an annexation against which a losing school corporation shall remonstrate, the annexation shall not take place. Nothing in this Section shall be construed to diminish the primary determinants now set out in said Section 243 with reference to remonstrances filed by parties other than the losing school corporation.

(c) Whenever after the effective date of this act the governing body of a civil city shall adopt an ordinance effecting such a civil annexation as is described in Section 9(a) of this act, the school city and the losing school corporation shall have power to agree that none, or only a part, of the territory affected by such civil annexation shall become, by virtue of such civil annexation, a part of the school city. Every such agreement shall be embodied in a substantially indentical resolution adpoted by the school city and by the losing school corporation, and notice of the adoption of such resolution shall be published within the time fixed by Section 243 of Chapter 129, Acts 1905, as amended, for the taking of an appeal from a civil annexation. Such publication of notice shall be made in the manner provided in Section 5(a) of this act. Whenever such an agreement with respect to a civil annexation shall have been entered into, the losing school corporation shall be deemed thereby to have waived the right, which is given by Section 9(b) of this act, to remonstrate against and appeal from such annexation.

(d)(i) If, on the effective date of this act, the governing body of a civil city shall have adopted an ordinance effecting such a civil annexation as is described in Section 9(a) of this act, which civil annexation is then subject to, or the subject of, such an appeal as is provided for in said Section 243 of Chapter 129, Acts 1905, as amended, then, in such event, the losing school corporation shall have no right to appeal from such civil annexation, notwithstanding the provisions of Section 9(b) of this act, and the boundaries of the school city shall be deemed to be extended to include the territory involved in such civil annexation, the effective date of such extension to be determined in accordance with Section 9(a) of this act.

(ii) Nothing in this act shall be deemed to affect directly, indirectly, or by implication the question whether any civil annexation that became finally effective prior to the effective date of this act resulted in the extension of the boundaries of any school city.

SEC. 10. All laws or parts of laws in conflict herewith are hereby repealed. This act shall not, however, be construed to repeal any part of Chapter 202, Acts 1959, or any act concerning the consolidation of two or more school corporations, to which this act shall be supplementary, except to the extent that said Chapter 202 conflicts with the subsequent provisions of this section. No annexation that is undertaken pursuant to, or that results by operation of, any Section of this act shall require, for its effectiveness, any approval of any county committee or state commission or committee created pursuant to, or referred to in, said Chapter 202, Acts 1959. The provisions of Section 9 of this act shall operate after the effective date of this act both before and after a final plan has been put into effect by election, petition or other proceeding under the provisions of said Chapter 202 or any other act concerning the consolidation of two or more school corporations.

SEC. 11. If any provision of this act or the application thereof to any person or circumstances is invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SEC. 12. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after the passage.

CHAPTER 52.

[S. 153. Approved February 25, 1969.]

AN ACT amending an Act concerning school corporations.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. Acts 1961, c. 186, s. 4 is amended to read as follows: Sec. 4. An annexation may also be effected by any school city as follows:

(a) The acquiring school corporation shall adopt an annexation resolution of the type provided in Section 3. Unless the losing corporation shall consent, such resolution shall not provide a time for annexation prior to the July 1st succeeding the May 1st next succeeding the last publication of the notice of annexation.

(b) After the adoption of such resolution, the acquiring school corporation shall give notice of the type provided in Section 3 by publication in the acquiring school corporation and in the losing school corporation. It shall also give notice to the losing school corporation prior to the last publication of notice therein. The annexation shall take effect thirty (30) days after the last such publication in the losing school corporation or at the time provided in such resolution whichever is later, unless within such a period a remonstrance (based on a ground other than that set out in Section 6(a)(5) of this act) is filed in the circuit or superior court of the county where

the annexed territory or a part thereof is located, by the losing school corporation, by not less than a majority of the owners of land in the annexed territory, or by the owners of seventy-five per cent (75%) or more in assessed valuation of the real estate in the annexed territory.

(c) For purposes of determining such ownership, the following rules shall apply: Only the record title holder or holders of any single piece of property shall be an owner. Where record title of any single piece of property is in more than one person, all of them together shall constitute only one owner, and the remonstrance of any one of them shall constitute the remonstrance of all, whether or not authorized by the others.

SEC. 2. Acts 1961, c. 186, s. 9 is repealed as to all annexations which have not become effective or finally effective prior to the effective date of this act.

SEC. 3. Acts 1961, c. 186 is amended by adding a new and additional section to be numbered Section 9a and to read as follows: Sec. 9a. Notwithstanding any act which provides in substance that the boundaries of any school city or school town are coterminous or coextensive with the boundaries of any civil city or civil town, the boundaries of a school city (as such term is defined in this act) shall be changed after the effective date of this act in 1961 solely by an annexation in accordance with the terms of this act in effect at the time such annexation is effective or finally effective.

SEC. 4. Acts 1961, c. 186, s. 10 is hereby amended to read as follows: Sec. 10. All laws or parts of laws in conflict herewith are hereby repealed. This act shall not, however, be construed to repeal any part of Chapter 202, Acts 1959, or any act concerning the consolidation of two or more school corporations, to which this act shall be supplementary, except to the extent that said Chapter 202 conflicts with the subsequent provisions of this section. No annexation that is undertaken pursuant to, or that

results by operation of, any Section of this act shall require, for its effectiveness, any approval of any county committee or state commission or committee created pursuant to, or referred to in, said Chapter 202, Acts 1959. The provisions of Section 9 of this act, with respect to any annexation which is finally effective prior to the effective date of the act amending this section in 1969, shall operate after the effective date of this act both before and after a final plan has been put into effect by election, petition or other proceeding under the provisions of said Chapter 202 or any other act concerning the consolidation of two or more school corporations.

SEC. 5. If any provision of this act or the application thereof to any person or circumstances is invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

SEC. 6. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after the passage.

CHAPTER 173.

[S. 543. Approved March 13, 1969.]

AN ACT concerning reorganization of government in counties containing a city of the first class.

Be it enacted by the General Assembly to the State of Indiana:

ARTICLE I—TITLE DEFINITIONS AND APPLICABILITY OF ACT

SECTION 101. Reference to Act. This Act shall be known and may be cited and referred to as the "Consolidated First-Class Cities and Counties Act".

SEC. 102. Definitions. As used in this Act, the following terms shall have the following meanings:

(a) "City of first class" shall be a city of the first class as defined in Acts 1933, c. 233, s. 1.

(b) "County" shall be any county in this State in which there is one but not more than one city of the first class and no city of the second class.

(c) "First Class City" shall be the city of the first class located in a County.

(d) "Excluded City" shall mean any city other than a First Class City in the County and any town in the County having a population in excess of 5,000 inhabitants according to the last preceding United States decennial census.

(e) "Included Town" means any town having a population of less than 5,000 inhabitants according to the last preceding United States decennial census, all or any part of which is located in the county.

(f) "Consolidated City" shall be a body corporate, created by this Act, and including within its boundaries all of the territory of a First Class City and of the County, except for the territory located in Excluded Cities; Provided, however, That certain departments and special taxing districts of the Consolidated City may have jurisdiction as provided in this Act in territory greater or less than such territorial boundaries. The Consolidated City shall be a city and shall be a city of the first class within the meaning of all laws of the State.

(g) "Mayor" shall be the chief executive officer of the Consolidated City with the powers provided herein.

(h) "City-County Council" shall be the principal legislative body of the Consolidated City and of the County with the powers provided herein.

(i) "Departments" of the Consolidated City and "Divisions" of such Departments are organizational units of the Consolidated City, the chief executive officers of which have the duties and powers assigned or authorized to be assigned under this Act. The chief executive officers of each Department and any Division

thereof shall, except where they are otherwise styled in this Act, be known respectively as "Director" and "Administrator".

(j) "Member" shall refer to the member of any council, board or commission set up hereunder; unless otherwise styled the presiding officer thereof shall be the chairman.

(k) A "Special Taxing District" of the Consolidated City shall be a district of less, equal or greater territorial limits than the boundary of the Consolidated City, in which the property owners thereof bind themselves, pursuant to the procedures authorized herein or heretofore authorized by applicable law, for the construction and maintenance of a local public improvement for the use of those who receive the benefit thereof; and projects may include, but shall not be limited to the construction of storm sewers, sanitary sewers, flood control, drainage and water course improvements, parks, redevelopment projects, thoroughfares, roads and any other project permitted under applicable law for a special taxing district of a city of the first class or the Consolidated City.

(l) A "Special Service District" of or operating in connection with the Consolidated City shall be a district within the Consolidated City or the County formed, created or authorized to be created under this Act for the purpose of providing the property owners therein with a service or services; it shall be administered under the administrative structure of the Consolidated City in accordance with this Act, but shall be a separate body corporate, without, however, the power to issue general obligation bonds.

(m) A "Special Service District Council" shall be comprised of the members of the City-County Council elected from all those districts which encompass any part of a Special Service District.

(n) Where any employee, officer or member of a board or commission serves as "at the pleasure of" or "may be removed by" any appointing or hiring officer, employee or body, such

person shall have no relief judicial or otherwise by reason of his termination or removal.

(o) Reference to "law" or "laws" shall mean the applicable statutes, including but not limited to this Act, and any regulations related to such statutes, adopted before or after the effective date of this Act, on any subject, as for example, in the phrases "in accordance with applicable law", "permitted by law" or "authorized by law".

(p) A reference to any statute by the year adopted and the chapter number, as for example, Acts 1905, c. 129, or to a section of any statute, as for example, Acts 1905, c. 129, s. 53, shall refer to such act or section, any amendments thereto, and any statute or statutes which repeal, supplement or supersede such statute or section, adopted before or after the effective date of this Act.

(q) An "article" of this Act shall refer to the section or group of sections commencing with the same digit or digits, disregarding the last two digits to the right, as for example, sections 101, 201 or 1001, each of which would be in a separate article, or section 101, 102 or 103 which would be in the same article.

(r) "This Act" shall refer to this Act as originally enacted or hereafter amended.

(s) The "effective date of this Act" shall refer to the effective date for the taking effect of its various sections or articles provided in Article XV.

SEC. 103. Applicability. At the time or times provided in Article XV of this Act: a Consolidated City which shall be a municipal body corporate shall be formed in each County (as defined herein); the Consolidated City, its Departments, Special Taxing Districts and Special Service Districts shall have the territorial jurisdictions and the duties and powers provided in this Act and the First Class City shall be merged into the Consolidated City and the First Class City shall be abolished as a separate entity.

SEC. 104. Identification. The Consolidated City shall be known as "City of .....". In such blank shall be inserted the name of the First Class City.

* * * * *

SEC. 314. Existing Boards, Agencies and Commissions. At the time all or substantially all of the power and duties of any agency, board or commission of a First Class City are transferred under the terms of this Act to any Departments, Special Taxing Districts or Special Service Districts of the Consolidated City, such agency, board or commission of the First Class City shall be abolished.

At the time the power and duties to perform any function is transferred from any agency, board or commission of the First Class City, the County or any body corporate to the Consolidated City, or any Department, Special Taxing District or Special Service District thereof, the property, records, personnel, contracts and all other rights and liabilities thereof related to such function, including all rights and obligations arising under any pension or retirement plan or fund, shall be similarly transferred except as follows: (1) the City-County Council may by ordinance direct a different repository therefor; (2) general obligation bonds or other indebtedness of the First Class City or indebtedness assumed by the First Class City, other than bonds or indebtedness relating to the function of a Special Service District, shall be binding upon and obligations of the Consolidated City; (3) bonds or indebtedness relating to any function transferred to a Special Service District shall be binding upon and obligations of the Consolidated City; (4) bonds and indebtedness of the Special Taxing District which continues the function of the special taxing district on account of which such bonds and indebtedness were issued. Nothing in this Act shall be construed to impair the obligation of any indebtedness or contract existing on the effective date of this Act.

All proceedings and petitions pending before any board, commission or other agency at the effective date the powers thereof are transferred under the terms of this Act shall be transferred to the official, board, commission or agency who would have the power to act upon such proceeding or petition under the terms of this Act.

All other municipal corporations, boards, agencies and commissions created by applicable law, or by any ordinance until such ordinance is amended, shall not be affected by this Act, except to the extent that such powers are transferred to the Consolidated City or Department thereof or are otherwise limited under this Act. Without limiting the generality of the following enumeration, such municipal corporations, boards, agencies, authorities and commissions shall include: airport authority and board established pursuant to Acts 1961, c. 293; health and hospital corporation and board established pursuant to Acts 1951, c. 287; county department of welfare and board established pursuant to Acts 1936 (Spec. Sess.), c. 3; county home board established pursuant to Acts 1955, c. 119; building authority, board of trustees and board of directors established pursuant to Acts 1953, c. 54; capital improvements board of managers established pursuant to Acts 1965, c. 326; housing authority established pursuant to Acts 1937, c. 207, except to the extent expressly limited or changed by Article VIII of this Act; library districts and boards thereof established pursuant to Acts 1947, c. 321; and any school corporation, all or a part of the territory of which is in the Consolidated City or County. Where, however, after the effective date of this Act, the power to make an appointment to the governing body or any other board connected with such board, agency or commission, or the power to take any action in connection with the operation of such board, agency or commission, is vested in the County Council of the County or the Common Council of the First Class City, such power shall be vested in the City-County council.

* * * * *

CHAPTER 239.

[H. 1006. Approved March 14, 1969.]

AN ACT relating to cities and towns; their common powers; annexation of territory; additions, plats, and repealing certain laws.

Be it enacted by the General Assembly of the State of Indiana:

ARTICLE 1. Definitions and Citation Reference

SECTION 101. This act may be cited and referred to as the City and Town Act of 1969.

* * * * *

ARTICLE IV. Annexation

SEC. 401. The common council may, by ordinance, declare and define the entire corporate boundaries of the city, and the ordinances, properly certified, shall be conclusive evidence, in any court or proceeding, of the boundaries of the city. The ordinances defining the entire city boundary may include contiguous territory, whether platted or not, not previously annexed, and may include such terms and conditions, as hereinafter defined, as may be deemed just and reasonable by the common council, and the annexation ordinances shall become final and binding sixty (60) days after final publication thereof as required in section 402 of this article in the absence of remonstrance and appeal as provided in section 406 of this article.

SEC. 402. The common council may also, by separate ordinance not purporting to define the entire boundaries of the city, annex contiguous territory, whether platted or not, to the city, and may include such terms and conditions, as hereinafter defined, as may be deemed just and reasonable by the common council, and a certified copy of the ordinances shall be conclusive evidence in any proceeding that the territory

therein described was properly annexed and constitutes a part of the city. The annexation ordinances shall become final and binding sixty (60) days after final publication thereof in the absence of remonstrance and appeal as provided in section 406 of this article. Immediately after the passage of every such ordinance the same shall be published once each week for at least two (2) consecutive weeks in accordance with Chapter 96, Acts of 1927, as amended.

SEC. 403. The terms and conditions applicable to the annexation may relate to any matter reasonably and fairly calculated to render the annexation just and equitable both to the city, its property owners and inhabitants, and to the annexed territory, its property owners and inhabitants, including, but not restricted to, such matters as: (a) postponing the effective date of such annexation; (b) impounding in a special fund in whole or in part the municipal property taxes to be imposed upon the annexed territory after annexation shall take effect, in such amount and for such period of time, not to exceed three (3) years, as the common council may determine, and using the impounded taxes solely for the benefit of the annexed territory, its property owners and inhabitants, in the extension of municipal services and benefits and the making of municipal or public improvements in the annexed territory; or (c) establishing equitable provisions for the future management and improvement of the annexed territory and for the rendering of needed services.

SEC. 404. The mayor and the proper administrative board with the ratification and approval of the common council shall also have the power, in lieu of annexing contiguous territory or in cases not involving any proposed annexation of territory, to enter into contracts with the owners or lessees of designated property in the vicinity of the city, whether within or without the county in which the city is located, providing for the payment or contribution of money to the city to be used for such municipal or public purposes as may be specified

in the contract, whether the payments are related to or in consideration of municipal services or benefits already received, or to be received under the contract or otherwise, by the property owners or lessees, or whether the payments are in lieu of taxes that might be levied upon annexation of the designated property, or whether the payments are wholly unrelated to municipal services or benefits to or potential tax impositions upon the designated property.

The contracts may be entered into for such period of time, not exceeding fifteen (15) continuous years under any one (1) contract, with first and second class cities, and not exceeding four (4) continuous years under any one (1) contract with third, fourth and fifth class cities, as the city and the property owners or lessees shall agree upon. Unless the control is induced by the fraud of the property owners or lessees or is grossly and corruptly improvident on the part of the city, the same shall continue in force for the full term of the contract, or until the contract is terminated or reduced in duration by mutual agreement of both the city and the property owners or lessees, and, if the contract provides, during the effective term of any such contract the designated property of the contracting owners or lessees all not be subject to annexation by the contracting city.

Any other municipal authority having taxing power in respect to the designated property or entitled to share in the property taxes assessed and collected by the city may join in any such contract, or enter into a separate contract with the city, providing for the division and distribution of the payments to be made under the contract and for the receipt of a share thereof by such other municipal authority.

SEC. 405. Whenever the owners of real estate situated outside the corporate boundaries of any city, but adjacent thereto, desire to have real estate annexed to the city, they may file with the common council of the city a petition bearing the signatures of fifty-one percent (51%) of the owners of

land in the territory sought to be annexed, requesting a special ordinance for the purpose of annexing the contiguous territory described in the petition. If the common council fails to pass the special ordinance within sixty (60) days from the date of the filing of the petition, the petitioners may file a duplicate copy of the petition in the circuit or superior courts of the county where the territory is situated or with the judge thereof in vacation and the petition shall state the reason why the annexation should, in justice, take place. Notice of the proceedings, by way of summons, shall be served upon proper officers of the city to which the petition has been presented and the city shall become defendant in the cause and shall be required to appear and answer as in other cases. The court or judge thereof in vacation shall thereupon proceed to hear and shall give judgment upon the question of annexation according to the evidence which either party may introduce. If the evidence establishes that:

(a) Essential municipal services and facilities are not available to the inhabitants of such territory; and

(b) The city is physically and financially able to provide municipal services to the area sought to be annexed; and

(c) The total resident population of the area sought to be annexed is equal to at least three (3) persons for each acre of land included within its boundaries; and

(d) At least one-eighth of aggregate external boundaries of the territory sought to be annexed coincide with the boundaries of the annexing city; the court shall order the proposed annexation to take place, notwithstanding the provisions of any other law of this state.

If, however, the evidence does not establish all four (4) of the foregoing factors, the court shall deny the petition to annex and dismiss the proceeding.

SEC. 406. Whenever territory is annexed to a city, whether by general ordinance defining the city boundaries or by

special ordinance for the purpose of annexing territory, an appeal may be taken from the annexation by either a majority of the owners of land in the territory or by the owners of more than seventy-five percent (75%) in assessed valuation of the real estate in the territory, if they deem themselves aggrieved or injuriously affected, by filing their remonstrances in writing against the annexation, together with a copy of the ordinance, in the circuit or superior courts of the county where the territory is situated or with the judge thereof in vacation within sixty (60) days after the last publication provided for in section 402 of this article. The written remonstrance or complaint shall state the reason why annexation should not in justice take place.

Upon receipt of the remonstrance, the court or the judge thereof in vacation shall determine whether it bears the necessary signatures and complies with the requirements of sections 406 through 408 of this article. In determining the total number of landowners of the area and whether or not signers of the remonstrance are landowners, the names as they appear upon the tax duplicate shall be prima facie evidence of ownership. In ascertaining the number of landowners of the area and for the purpose of determining the sufficiency of the remonstrance as to the number of landowners required to constitute a majority, not more than one (1) person having an interest in a single property, as evidenced by the tax duplicate, shall be considered a landowner.

Upon the determination of the judge of the court that the remonstrance is sufficient he shall fix a time for a hearing on the remonstrance which shall be held not later than sixty (60) days thereafter. Notice of the proceedings by way of summons shall be served upon the proper officers of the city seeking to make annexation, and the city shall become defendant in such cause, and shall be required to appear and answer as in other cases.

SEC. 407. The judge of the circuit or superior court shall, upon the date fixed, proceed to hear and determine the appeal

without the intervention of jury, and shall, without delay, give judgment upon the question of the annexation according to the evidence which either party may introduce. If the evidence establishes that:

(a) The resident population of the area sought to be annexed is equal to at least three (3) persons for each acre of land included within its boundaries or that the land is zoned for commercial, business or industrial uses or that sixty percent (60%) of the land therein is subdivided; and

(b) At least one-eighth of the aggregate external boundaries of the territory sought to be annexed coincide with the boundaries of the annexing city; and

(c) The annexing city has developed a fiscal plan and has established a definite policy to furnish the territory to be annexed within a period of three (3) years, governmental and proprietary services substantially equivalent in standard and scope to the governmental and proprietary services furnished by the annexing city to other areas of the city which have characteristics of topography, patterns of land utilization and population density similar to the territory to be annexed; the court shall order the proposed annexation to take place notwithstanding the provisions of any other law of this state.

If however, the evidence does not establish all three (3) of the foregoing factors the court shall sustain the remonstrance and deny the annexation unless the area although not meeting the conditions of factor (a) supra is bordered on one-fourth of its aggregate external boundaries by the boundaries of the city and is needed and can be used by the city for its future development in the reasonably near future, the court may order the proposed annexation to take place notwithstanding the provisions of any other law of this state. The laws providing for change of venue from the county shall not apply, but changes of venue from the judge may be had as in other cases. Costs shall follow judgment. Pending the appeal, and during the time

within which the appeal may be taken, the territory sought to be annexed shall not be deemed a part of the annexing city.

SEC. 408. Upon the determination of the appeal, the judgment shall particularly describe the ordinance upon which the appeal is based, and the clerk of the circuit court shall forthwith deliver a certified copy of the judgment to the clerk or clerk-treasurer of the city, who shall record the same in the ordinance record and make a cross reference to the page thereof upon the margin where the original ordinance was recorded. In case the decision is adverse to annexation, no further annexation proceedings for the territory shall be lawful for two (2) years after the rendition of the judgment, unless the annexation is petitioned in conformance with provisions of section 405 of this article.

SEC. 409. Annexation of a city or town regardless of population shall not be made under any of the provisions of this article, but shall only take place in accordance with the provisions of Article III, Union of Cities and Towns, section 301.

SEC. 410. In all cases where any city or town annexes any territory, or where any town is incorporated, and where the civil township, from which such territory was or is taken, is indebted or has outstanding unpaid bonds or other obligations at the time of an annexation or incorporation of such territory, then such city or town, as the case may be, shall be liable for, and pay so much of such indebtedness of the civil township in proportion that the assessed valuation of property in the annexed or incorporated territory is to the valuation of all property in the township, as the same is assessed for general taxation, as shown by the last preceding assessment for taxation prior to the annexation of any such territory or incorporation of any such town, unless the assessed property within the city or town shall already be liable for such indebtedness.

The annexing city or town, or newly incorporated town, shall pay such part or portion of the unpaid indebtedness of the

civil township to the township trustee: Provided, That in case the indebtedness consists of outstanding unpaid bonds or notes of the civil township, then the payment to the trustee shall be made at such time as the principal, or any part thereof, or interest on such bonds or notes falls or becomes due.

SEC. 411. Towns may annex contiguous territory in the manner provided by sections 412 through 414 of this article.

SEC. 412. Annexation of contiguous territory shall be made by the enactment of a town ordinance pursuant to the general procedure provided for the enactment of either separate or special annexation ordinances by cities and shall include a description of the territorial limits of the area. Owners of real estate situated outside, but adjacent to the corporate boundaries of any town may petition the town board to have real estate annexed in the same manner and to the same effect that owners of real estate may petition the common councils of cities to annex territory: Provided, That if any of the area sought to be annexed lies within any county or counties other than the home county of the annexing town, any of the circuit or superior courts of any affected county shall have jurisdiction of any appeal.

SEC. 413. If any part of the area sought to be annexed, by a town lies within four (4) miles of any point on the perimeter of a city of the first class, or within three (3) miles of any point on the perimeter of a city of the second or third class, the consent of the common councils of such cities shall be obtained before annexation as a condition of validity: Provided, That in counties where a metropolitan plan commission is in existence, the consent of the metropolitan plan commission in lieu of the consent of the common councils of such cities shall be obtained.

SEC. 414. Town annexation shall not be sustained on appeal unless the following requirements have been met:

(a) The resident population of the area sought to be annexed is equal to at least three (3) persons for each acre of land

included within its boundaries or that the land is zoned for commercial, business, or industrial uses or that sixty percent (60%) of the land therein is subdivided; and

(b) At least one-eighth of the aggregate external boundaries of the territory sought to be annexed coincide with the boundaries of the annexing town; and

(c) The annexing town has developed a fiscal plan and has established a definite policy to furnish the territory to be annexed within a period of three (3) years, governmental and proprietary services substantially equivalent in standard and scope to the governmental and proprietary services furnished by the annexing town to other areas of the town which have characteristics of topography, patterns of land utilization and population density similar to the territory to be annexed.

If, however, the evidence does not establish all three (3) of the foregoing factors the court shall sustain the remonstrance and deny the annexation unless the area although not meeting the conditions of factor (a) supra is bordered on one-fourth of its aggregate external boundaries by the boundaries of the town and is needed and can be used by the town for its future development in the reasonably near future, the court may order the proposed annexation to take place notwithstanding the provisions of any other law of this state. The laws providing for change of venue from the county shall not apply, but changes of venue from the judge may be had as in other cases. Costs shall follow judgment. Pending the appeal, and during the time within which the appeal may be taken, the territory sought to be annexed shall not be deemed a part of the annexing town.

* * * * *

IN THE

Supreme Court of the United States

October Term, 1976

Nos.: 76-212, 76-458, 76-468, 76-515, 76-520 and 76-522.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA,
THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; THE SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA,
THE METROPOLITAN SCHOOL DISTRICTS OF LAWRENCE, WARREN and WAYNE TOWNSHIPS, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA,

Appellants,

and

OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE L. SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body,
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS,
THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS, INDIANA,

Petitioners,

vs.

DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by the original defendants; UNITED STATES OF AMERICA, et al,

Appellee-Respondents.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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MOTION TO DISMISS OR AFFIRM AND NOT TO GRANT A WRIT OF CERTIORARI

Appellees-Respondents Buckley move the Court to dismiss the appeal herein and not to grant a writ of cert-

iorari or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Seventh Circuit on the ground that manifestly the questions on which the decision of the case depends are so unsubstantial as not to need further argument.

I

THE QUESTIONS PRESENTED

The ultimate question presented is whether the District Court erred in finding interdistrict violations of the Fourteenth Amendment and ordering a limited interdistrict remedy. This question depends, in turn, upon the question of whether there was sufficient evidence to support findings that the racially invidious effects of

(a) the General Assembly's separation in 1969 of IPS boundaries from those of the City of Indianapolis via the Uni-Gov legislation,

(b) the General Assembly's failure in any other way to alleviate the conditions of segregation within IPS and between IPS and the other school systems in Marion County, and

(c) the placement of all public housing (now 98% black) within IPS,

were traceable ultimately to the purposeful discrimination and interdistrict violations evidence by

(1) Indiana's almost 100 years history of racial discrimination, prior to 1949, in school attendance laws, in enforcing racial covenants in housing, and in other policies which discriminated against black people, denying them residential and educational opportunities in Marion County in areas other than an all-black residential community in the center of Indianapolis, served by Crispus Attucks, the lone all-black high school, and

(2) The commission by state officials of acts of *de jure* segregation during the 1950s and 1960s, particularly in approving the location of three new all-white high schools well away from the path being taken by the expending black residential area toward and, eventually, in some places, across the borders of IPS, and

(3) The obvious effects of Uni-Gov, the General Assembly's signalled lack of concern with aleviating the segregation problem, and the placement of public housing in making it impossible to deal effectively with the interdistrict and intradistrict conditions of segregation theretofore brought about in substantial part by actions of the state without an interdistrict remedy.

II

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. The Statutes

The Statutes involved in this litigation are:

(1) Chapter 15, R. S. 1843 p. 306, 320 § 102 (See *Lewis v. Henley*, 2 Ind. 332 (1850)). This act barred Negroes from admission to the common schools.

(2) Acts 1869, Ch. 16, #3, p. 41. This Act, for the first time in Indiana, provided for the education of black students, but required that they should be organized into separate schools.

(3) Acts 1877, Ch. 81, #1, p. 124. This Act required admission of black students to white schools, if no separate school of comparable grade was provided for black students.

(4) Act 1935, Ch. 296, #1, p. 1457. This Act required the Board to provide transportation for black students required to travel more than a certain distance by reason of the State's segregation policies.

(5) Acts 1935, Ch. 77, #1, p. 23. This Act, in effect, ordered township trustees to furnish a separate school building and teacher for the instruction of a black student rather than permit that child to attend a white school.

(6) Acts 1949, Ch. 186, p. 603; Burns Ind. Stat. Ann. #28-6106 o 28-6112 (1970), as amended I.C. 1971, 20-4-1-7 to 20-4-1-13. This Act declared that it was the policy of the State to desegregate public education, one grade at a time.

(7) The 1959 Indiana School Reorganization Act, Acts 1959, ch. 202 #1; Burns Ind. Stat. Ann. #28-3501 (1961); I.C. 1971, 20-4-1-1, et seq. This Act created a school consolidation plan except for Marion County.

(8) Acts 1961, ch. 186, #1; Burns Ind. Stat. Ann. #28-3610 (1971); I.C. 1971, 20-3-14-1 et seq. This Act provided that extension of civil city boundaries automatically extended corresponding school city boundaries—subject to remonstrance by the school city whose territory was taken, a provision which in its operation blocked expansion of IPS.

(9) Acts 1969, ch. 62 #3; Burns Ind. Stat. Ann. 28-3618 (1971); I.C. 1971, 20-3-14-9. This Act, adopted 16 days before Uni-Gov., amended the 1961 Act cited above by abolishing the power of IPS to follow municipal annexations.

(10) Acts 1969, ch. 173, #101; Burns Ind. Stat. Ann. ##48-9101 et seq., I.C. 1971, 18-4-1-1 et seq. This Act, the so-called Uni-Gov Act, reorganized government in Marion County but specifically excluded school districts.

(11) P.L. 94 of the Acts of 1974, Burns Ind. Stat. Ann. #28-5031—28-5040, I.C. 1971, 20-8.1-6.5 et seq. This Act provided that a transferor school corporation must pay a transferee school corporation for the cost of education of a pupil transferred from the one to the other in compliance with a final court order based upon a violation of the Equal Protection Clause.

B. The Proceedings Below

Indianapolis I. United States v. Board of Sch. Com'rs., Indianapolis, Ind., 332 F. Supp. 655 (S.D. Ind. 1971), aff'd 474 F. 2d 81 (7 Cir. (1973))., cert. den. 413 U.S. 920, 93 S. Ct. 6066, 37 L. ed. 1041 (1973). The District Court's opinion in this first phase of the litigation found that

(1) The state has ultimate responsibility for education in Indiana. 332 F. Supp. 655, at 659.

(2) Before Statehood, slavery was recognized in Indiana. Id. at 660.

(3) After Statehood, discrimination was the official policy of the state. There were constitutional limitations on the right of blacks to vote (not removed until 1881) and to serve in the militia (not removed until 1936). Statutes limited the right of blacks to give testimony in court, to intermarry, to inherit, and required that they post bond on coming into the State as a pledge of good behavior.

Id. at 660, 661. The district court also pointed out that.

> "Negroes were rarely admitted, save on a segregated basis, to theaters, public parks, and the like, including State parks operated by the Indiana Department of Conservation, until after World War II. They were confined to segregated wards in public hospitals supported by tax funds, and as we shall see, largely attended segregated schools." 332 F. Supp. 655 at 661.

(4) Segregation in the housing of black families persisted in Indianapolis at least until the date of the filing of this action. The court listed a number of informal methods by which this was carried out, including racial covenants in housing. Id. 661-63.

(5) With respect to involvement of the areas surrounding Indianapolis in these segregation practices, the court noted that,

> "It is common knowledge that in many small towns and a few of the larger ones in Indiana the custom that Negroes were not allowed to stay overnight was so invoidable that it had the force of law and was actually enforced by local officials. Thus today it is noticeable that almost no Negroes are to be found in communities adjoining the School City of Indianapolis. Marion County has three municipalities other that Indianapolis, all contiguous to the School City. Beech Grove, an industrial community of 13,432, has a Negro population of 19. Speedway City, a similar type community, has 68 Negroes out of a total population of 18,997. Of Marion County's 792,299 residents, 134,474 or 17% are Negro. Of these, approximately 122,086, or 98.5% are confined to the central

> area served by the defendant School Board." 332 F. Supp. 655 at 663.

(6) The court reviewed pre-1949 Indiana Statutes which established segregation in the schools as the official policy of the State. It noted that from the inception of public education in Marion County was segregated, beginning with a building on Market Street. When Crispus Attucks was opened in September, 1927, all Negro high school students were compelled to attend it, regardless of their place of residence in the city. Id. at 664.

(7) The court engaged in a painstakingly detailed analysis of school attendance figures and Board practices between 1949 and 1954 and after 1954 to the time of the litigation. He concluded that the Board had purposefully attempted to cement in place the segregated character of the elementary and high schools. The techniques used to continue segregation included attendance zone boundary changes, the construction of additions, the construction of new schools, the provision of transportation or the adjustment of existing transportation, alternation in grade structures, the location or relocation of special education classes, optional attendance zones, and various combinations of these techniques. Id. at 665-70.

(8) Since the instant litigation was filed, the Board took a few steps to rectify its failure to comply with *Brown II*, but was unwilling to proceed further unless ordered by the court. Id. at 670-72.

(9) The court recounted external problems facing the Board: relocation of white families into surrounding school districts and the location of low rental

public housing projects in the city (typically on the periphery of an established Negro residential area so that they attracted Negro occupancy and thus affected the racial composition of the school serving that area). Id. at 672-673.

(10) The court then considered Uni-Gov, and the 1961 Act because of which, said the court,

> "For the first time, it became possible for the School City of Indianapolis, alone among the major school cities of the State, to have jurisdiction over a lesser territorial area than the corresponding civil city." 332 F. Supp. 655 at 675.

With regard to the combined effect of Uni-Gov and that Act the court stated that,

> "Considering the history of segregation of the Negro in Indiana and in Indianapolis, the racial complexion of the outside school corporations and the adjoining counties in the Indianapolis Metropolitan Area, the ongoing flight to the suburbs by the white population of the School City, and the various other factors above set out, the effect of the 1961 and 1969 Acts of the General Assembly referred to in this section may well have been to retard desegregation and to promote segregation. In other words, under previous Indiana law, which still applies to all cities except Indianapolis, civil annexation would automatically carry school annexation with it, and the chances of successful remonstrance against logical annexation by an expanding municipality, carrying with it the usual municipal services, would be virtually nil. Under the present law, if valid, the ability of the Board to expand its jurisdiction coterminous with the consolidated city, or for that matter to expand it at all, is likewise virtually nil, as a practical matter." 322 F. Supp. 655 at 676.

(11) The court found that the school system in Indianapolis was near the tipping point where the white exodus might become accelerated and irreversible. Id. at 676-77.

The district court then concluded that the Board was in violation of the Constitution and had a duty to take steps to convert to a unitary system in which racial discrimination would be eliminated root and branch. The court devised an interim plan and ordered that additional parties be joined in the litigation for the purpose of considering the full range of problems presented by the case, including the effects of the statutes previously mentioned. Id. at 677-681.

The Court of Appeals affirmed the district court 474 F. 2d 81 (1973). It noted that the district court found a purposeful pattern of racial discrimination based on the aggregate of many decisions of the Board and its agents. The appellants had denied any conscious motivation to foster or continue segregation policies. However, said the court,

> "In examining that which was in existence at the time of Brown I and that which transpired thereafter, the courts are not precluded from drawing the normal inference of intent from consummated acts. Intent in this sense, may or may not be consistent with expressed motivation." 474 F. 2d 81, at 84-85.

The court then held that not only was the district court's inference as to intent not clearly erroneous but, also, was "proper". Said the court,

> "As to this last point, we can only emphasize that there are very few cases of school segregation today in which the defendants admit that they had an improper intent. Such intent may then be properly

inferred from the objective actions." 474 F. 2d 81 at 88.

Indianapolis II United States v. Board of School Com'rs. 368 F. Supp. 1191 (S.D. Ind., 1973). Aff'd in part 503 F. 2d 68 (7th Cir. 1974). In the second trial of this case the parties were IPS, ten school systems located in Marion County, 10 school systems located outside Marion County, the State Defendants, and plaintiffs Buckley and the United States.

In its opinion, the court first found that because of racial percentages, white exodus, and the tipping point phenomenon, that a desegregation plan which, pursuant to *Green v. Board,* 391 U.S. 430 (1968), promises realistically to work, could not be put into effect within the boundaries of IPS. 368 F. Supp. 1191, at 1197-99. It then analyzed the education laws of Indiana in great detail, concluding that the State assumes responsibility for the conduct of local school corporations.

> "Such corporations were and still are involuntary corporations established as part of the school system of Indiana and are but agents of the State for purposes of administering the State system of education." 368 F. Supp. 1191, at 1201.

Actions of such corporations, said the court, must be considered acts of the State. Id. at 1199-1202.

The court found once again that the location of three new high schools in Indianapolis was an act of *de jure* segregation (Arlington, 1961, black enrollment .23% Northwest, 1963, black enrollment 0.0%; John Marshall, 1967, black enrollment 0.3%). The sites for the three high schools were approved by the appropriate agencies of defendants the Indiana State Board of Education and the

Superintendant of Public Instruction. These acts, held the court, were acts of segregation on the part of officials of the State. Similar examples, said the court, could be pointed out with regard to site selection for construction and enlargement of elementary schools, but there was no need to labor the point . 368 F. Supp. 1191, at 1202-03.

The court then said that,

> "Further, at all times since 1949, the Indiana statute forbidding racial segregation in educational opportunity has been in effect, IC 1971, 20-8-6-1 et seq., Burns 28-6106 et seq., and the mandate of the Supreme Court of the United States in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), has been the law since 1954. According to the evidence in this case, the officials of the State charged with oversight of the common schools have done almost literally nothing, and certainly next to nothing, to furnish leadership, guidance, and direction in this critical area. Even at this late date, the division of equal educational opportunity of the Indiana Department of Public Instruction, headed by the State Superintendent, consists of but four staff members and a secretary, to cover the entire State of Indiana, and has only been in existence for the past two years pursuant to a Federal grant. The Court finds that failure of the State Superintendent and the Board of Education to act affirmatively in support of the law was an omission tending to inhibit desegregation." 368 F. Supp. 1191, at 1203.

Turning to the possible impact of other actions by the State, the court said that

> "Although it is undoubtedly true that many factors enter into demographic patterns, there can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the

urban centers of the north, including Indianapolis, has been racial discrimination in housing which has prevented them from living any place else." 368 F. Supp. 1191, at 1204.

Elaborating, the court added that,

> "Such racial discrimination, which has been tolerated by the State at the least, and in some instances has been actively encouraged by the State, as set out in this Court's previous opinion, has had, as its end result, the creation of an artificial unrepresentative community, as pictured by the exhibits in this case. At the very least it may be said that Negroes have consistently been deprived of the privilege of living within the territory of the added defendants by reason of the customs and usages of the communities embraced within such boundaries, and of the State." 368 F. Supp. 1191, at 1204-05.

The court concluded that the acts of *de jure* segregation found by the court are imputed to the State, that state officials had engaged in acts of *de jure* segregation, both by commission and omission, and that the General Assembly should be given a reasonable time to devise a feasible plan for ending the conditions of segregations then existing. Id. at 1205. Said the court,

> "In short, paraphrasing the holding of the Sixth Circuit in *Bradley et al. v. Milliken et al., supra,* this Court holds that the record establishes that the State has committed *de jure* acts of segregation and that the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts. There can be little doubt that a federal court has both the power and the duty to effect a feasible desegregation plan. Indeed, such is the essence of *Brown II. Brown v. Board of Education,* 349 U.S. 294, 300-301, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). In the instant case the only feasible desegregation plan involves the crossing of the boundary lines between IPS and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan. The power to disregard such artificial barriers is all the more clear where, as here, the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines."

The court then proceeded to fashion a metropolitan-wide remedy. Id. at 1206-1210.

This decision of the District Court was affirmed, 503 F. 2d 68 (7th Circuit, 1974), as to its findings of *de jure* segregation. Said the court

> "We conclude, as the district court did, that the state officials have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency utimately charged under Indiana law with the operation of the public schools has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries." 503 F.2d 68, at 80.

However, on the authority of *Milliken v. Bradley,* the decision was reversed as to remedies directed to school corporations outside of Marion County.

As to a metropolitan remedy within Uni-Gov boundaries, the case was remanded for further proceedings consistent with *Milliken v. Bradley,* specifically,

> "The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken.*" Id. at 86.

This court denied certiorari, 421 U.S. 929 (1975).

Indianapolis III. United States v. Board, 368 F. Supp. 1223 (S.D. Ind., 1973) was a supplemental memorandum of decision in which Judge Dillin explored guidelines that the legislature might use in carrying out its constitutional responsibilities.

Indianapolis IV. The instant phase of the case grows out of the remand of *Indianapolis II.* The findings and conclusions of the district court, unreported, may be found on page 36 of the appendix to the Jurisdictional Statement of The School Town of Speedway (No. 76-458.)

The District Court determined in *Indianapolis IV* that the establishment of the Uni-Gov (county-wide) boundaries of the City of Indianapolis without a like re-establishment of the Indianapolis Public School boundaries, taken together with all of the other evidence, warranted a limited interdistrict remedy within Uni-Gov (an area limited to territorial Marion County, Indiana), in accord with *Milliken v. Bradley.* 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed. 1069 (1974). After finding interdistrict violations of the constitution, the court ordered the transfer of about 6,533 black students to school systems surrounding IPS. After that transfer, the percentage of black pupils in IPS, said the court, would be below the point where resegregation inevitably occurs. That point according to findings of the district court (affirmed by the Court of Appeals), occurs when the percent of black students in a given school approaches 25% to 30%, more or less. The total enrollment of black students in each of the transferee school corporations will be approximately 15% black. Pursuant to Indiana statute, the transferor corporation (IPS) will pay the transferee school corporations (appellants) for the cost of educating the transferred

pupils. Acts 1974, P.L. 94 § 1, et seq. Burns Ind. Stat. Ann. §§ 38-5031-28-5040. I.C. 1971 20-8.1-6.5-1 et seq.

Appellant school districts appealed to the United States Court of Appeals for the Seventh Circuit. They were joined in this appeal by certiorari petitioners Otis R. Bowen as Governor of the State of Indiana, Theodore L. Sendak, as Attorney General of the State of Indiana, Harold H. Negley as Superintendent of Public Instruction of the State of Indiana and the Indiana State Board of Education, a public corporation body.

The Court of Appeals affirmed the district court in an opinion by Judge Swygert (Judge Tone dissenting). The majority found that Uni-Gov and its companion 1969 legislation were a substantial cause of interdistrict segregation contributed to the separation of the races by redrawing school district lines had an obvious racial segregative impact, and were not supported by any compelling state interest that would have justified the General Assembly's failure to consider the needs of the school system in its decision to enact Uni-Gov, thereby signalling its lack of concern with the whole problem and thus inhibiting desegregation with (sic) IPS.

The District Court in *Indianapolis IV* also found that the location by state instrumentalities of public housing (now having 98% black residents) on or near the Indianapolis Public School boundaries significantly affected the racial composition of schools within IPS and increased the separation of the races between IPS and the surrounding school districts. The District Court considered this fact together with the failure to enlarge IPS boundaries by Uni-Gov (or in any other way) in reaching its decision that an interdistrict violation had occurred and that a limited interdistrict remedy should include enjoining the Housing Authority from building additional public housing

within IPS and from renovating Lockfield Gardens for other than the elderly. The United States Court of Appeals for the Seventh Circuit affirmed this injunction (Judge Tone dissenting). The court stated that,

> "The record supports these findings and clearly shows a purposeful racially discriminatory use of state housing." (Speedway Appendix, P. A 23)

It should be stressed that the courts below have not held a state statute unconstitutional. Appellees agree with the statements of the Indianapolis Board of School Commissioners on page 3 of its response to an application for stay filed in this court.

> "Neither the decision and judgment of the District Court nor the opinion and judgment of the Court of Appeals declared or adjudged any of the three referenced 1969 Indiana Acts to be unconstitutional, enjoined the continued operation of any of such Acts, or directed any of the applicants or any other state officials to take action conflicting with their duties and responsibilities under any of such Acts."

Rather than find a state statute unconstitutional, the courts below have merely held that the General Assembly's failure to expand the boundaries of IPS through the Uni-Gov statute or in any other way to alleviate the conditions of segregation existing within IPS and between IPS and the other school systems in Marion County, taken together with all of the other evidence, helped establish an interdistrict violation and justified a limited interdistrict remedy. Thus, the courts below, examining all of the evidence, have traced the actions of the state and the existing interdistrict separation of the races ultimately to racially discriminatory purposes.

III

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY BY THIS COURT AND THE DECISIONS BELOW WERE CORRECT AND NOT IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS

Neither the District Court, in entering its order, nor the Court of Appeals, in affirming, intimated that this case involves a new or disputed point of law. Instead, both courts stated that they were applying to the evidence the basic principles of *Brown v. Board of Education*, 349 U.S. 294 (1955), and *Green v. County School Board*, 391 U.S. 430 (1968), as elaborated with respect to interdistrict violations and remedies by *Milliken v. Bradley*, 418 U.S. 717 (1974). In Milliken, this Court said that,

> "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation." *Milliken v. Bradley*, 418 U.S. 717, 744.

Judge Tone, dissenting, did not disagree with the District Court and the Circuit Court majority that *Milliken v. Bradley* stated the applicable law. Nor did he deny that state action had properly been found discriminatory or

that state action had been a substantial cause of interdistrict segregation. Rather, he asserted that the evidence did not establish, nor did the courts find, that excluding school boundaries from Uni-Gov and locating certain public housing projects within IPS were racially motivated actions. Thus, he concluded, there was no proof of a relevant racially discriminatory purpose. In support of his theory he cited *Washington v. Davis,* 96 S. Ct. 2040 (1976), in which this Court stated,

> "The school desegregation cases have . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis,* 96 S. Ct. 2040, 2048 (1976).

To the contrary of Judge Tone's analysis and in support of the decisions below, appellees submit two points:

(1) The District Court and the Court of Appeals, in accord with this court's holding in *Milliken* and its statement in *Washington v. Davis,* have properly found purposeful intradistrict and interdistrict violations by the state. Judicial opinions in *Indianapolis I, II* and *IV* have traced the invidious quality of Uni-Gov and the location of public housing ultimately to a number of purposeful discriminations of the state. They include, but are not limited to, over 100 years of state supported racial discrimination in education and housing and, since 1954, acts of *de jure* segregation by state officials who also did "nothing, or next to nothing" to implement the State's 1949 declaration of a nondiscriminatory policy in education. Further, the state has not shown, in accord with *Keyes v. School District No. 1,* 413 U.S. 189 (1973), that the intradistrict and interdistrict segregative effects of those purposeful discriminations within IPS and between IPS and

the rest of Marion County have become so attenuated that "the current segregation is in no way the result of those past segregation actions" *Keyes, supra,* at 211, n. 17.

(2) Even if Judge Tone's dissent correctly sought evidence of racial motivation in only the immediate context of the state's action on Uni-Gov and in locating public housing (ignoring all historical context), the opinions of the District Court and the Court of Appeals may fairly be interpreted to find purposeful discrimination based upon the current context, and such findings are not clearly erroneous in light of the evidence.

A. The invidious quality of Uni-Gov's failure to reestablish school lines or create transfer policies and the invidious quality of location all public housing within IPS has properly been traced by opinions in this case ultimately to racially discriminatory purposes of the State with respect to intradistrict and interdistrict segregation and separation of the races.

The opinion of the district court in *Indianapolis I* explained in great detail (by reference to Indiana Constitutions and to Indiana statutes and judicial decisions) that for over 100 years prior to 1949, the State of Indiana engaged in a blatent and purposeful policy of racial discrimination. The policy encompassed education, housing, and almost all aspects of life—including militia service, marriage, inheritance and admission to public places. Indeed, said the court,

> "It is common knowledge that in many small towns and a few of the larger ones in Indiana the custom that Negroes were not allowed to stay overnight was so invoidable that it had the force of law and was actually enforced by local officials." 332 F. Supp. 655, at 663.

The District Court's opinions in *Indianapolis I* and *II* analyzed how those policies and the customs supported by the policies resulted in the black families in Marion County being confined to a ghetto near the center of Indianapolis. After 1927, black high school pupils were confined to Crispus Attucks, the only high school in Marion County for black students, which had a set of all-black feeder schools.

It is crystal clear, therefore, from opinions of the District Court, affirmed by the Seventh Circuit, that purposeful actions by the State prior to 1949 contributed to the segregation and separation of the races within IPS and between IPS and the other school systems in Marion County.

How attenuated has that influence become since 1949? The District Court explained in *Indianapolis I* and *II* that in 1949 the state passed a declaration of policy calling for the gradual desegregation of public schools, one grade at a time. However, the judge also found from the evidence that state officials took no leadership action to enforce this policy or to interfere with local customs which continued to confine black residential areas to their historic patterns. Indeed, in the 1960's, so found the District Court and the Seventh Circuit, state officials joined IPS officials in purposeful racially discriminatory policies, including the location of three all-white high schools near the borders of IPS, well out of the path being taken by the gradually expanding black residential area toward and, eventually, in several places, across IPS boundaries. Restrictive residential practices continued.

Thus, by 1969, when the legislature undertook to reorganize the government in Marion County, the state had done literally nothing to alleviate the condition of racial segregation and separation within IPS and between

IPS and the surrounding school districts which its own laws and actions of its officials had helped to create and maintain. Its duty at that time, under *Green v. County School Board,* 391 U.S. 430 (1968), was clear: to come up with a plan would root out the remnants of its discriminatory actions. This could have been done by a system of transfers or by enlarging the boundaries of IPS. Instead, reversing a policy of long standing, the legislature detached the boundaries of IPS from those of the City of Indianapolis and expanded the boundaries of Indianapolis to the County Line for most functions of government, including the election of a Mayor, but specifically excluded the public schools. Nor did the legislature provide for transfers or in any other way attempt to alleviate the intradistrict and interdistrict separation of the races which had been brought about in substantial part by its laws and policies and by the practices of state officials. As the Seventh Circuit said,

> "The district court correctly observed, 'When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with (sic) IPS.'" (Speedway Appendix, p. A19.)

In 1974, the General Assembly passed an Act which can realistically be regarded as at least a partial recognition of its duties to deal with the interdistrict aspects of the segregation problem which the state had duties to alleviate. P.L. 94 of the Acts of 1974, Burns Ind. Stat. Ann. #28-5031-28-5040, I.C. 1971, 20-8.1-6.5-1 et seq. This Act provides for the interdistrict transfer of students. The transferor corporation must pay the transferee corporation for the cost of education of a pupil transferred. However, the statute comes into play only if transfer is ordered by a court

because of a violation of the Fourteenth Amendment and all avenues of appeal have been exhausted. Meanwhile, the artificial community hammered into place by state law prior to 1949 continues to exist while the percent of black students in IPS continues gradually to increase.

It is submitted that here, as in *Keyes*, the state has failed to carry its burden of showing that its past acts of intradistrict and interdistrict segregation have become so attenuated that "the current segregation is in no way the result of those past segregation actions." *Keyes v. School District No. 1,* 413 U.S. 189, at 211 n. 17. Here as in *Evans v. Buchanen,* 393 F. Supp. 428 (D. Del. 1975), aff'd. 96 S. Ct. 381 (1975), post-*Brown* acts by the state (e.g., approving the segregative placement of new high schools and elementary schools and siting all public housing projects within IPS) have contributed to intensify the interdistrict separation of the races. Here also, as in *Evans,* the invidious quality of state actions with clear segregation effects can ultimately be traced to a clear racially discriminatory purpose: the purpose which motivated the State's 100 year record of segregation laws, and which continued, apparently unabated, in actions of state officials which did not discourage and which, indeed, abetted the racial discrimination actively practiced by the IPS Board in the 1950s and 1960s.

B. The invidious quality of Uni-Gov and the siting of public housing can be and has been found in even the current context, divorced from the state's past segregation actions.

Appellees-respondents strongly assert that the invidious character of state action which does not alleviate segregated conditions created by purposeful action of the state should not be judged in isolation from that historical con-

ext. However, even if Judge Tone has correctly concluded in his dissent that a discriminatory purpose or motivation must be found by looking only at the current context of state action, it appears that the courts below have made the necessary findings on sufficient evidence.

With respect to housing, the matter could hardly have been put more clearly and succinctly. The District Court found that the location of housing projects on the edge of black residential areas had obviously tended to cause and to perpetuate the segregation of black pupils, saying,

> "The action of these agencies (The Metropolitan Development Commission, the Housing Authority of the City of Indianapolis, and the State) in confining poor blacks to the inner city has directly and proximately contributed to cause the suburban school districts within Marion County, other than Washington Township and Pike Township, to be and remain segregated white schools, with segregated white faculties and administrative staffs." (Speedway Appendix p. A40.)

Said the Seventh Circuit, in affirming:

> "The record supports these findings and clearly shows 'a purposeful racially discriminatory use of state housing.' *Milliken v. Bradley* 418 U.S. 717, 755 (1974) (Steward, J. concurring)." Id. at A23.

The Seventh Circuit continued:

> "By locating its projects within IPS and in many cases near all black neighborhoods, the Housing Authority significantly contributed to the disparity in residential and school populations between the inner city and suburbs. Its acts produced discriminatory effects both within IPS and the suburbs. Accordingly, the district court did not abuse its discretion in enjoining the Housing Authority from building additional projects within IPS. That part of the injunction that relates to Lockefield Gardens was also proper since permitting it to be used for family housing, where school

children are undoubtably involved, would only further aggravate the school segregation problem." Id. at A24.

Indeed, both the record and the trial court's findings relative to racial discrimination in Public Housing are proper since consistent with this court's holding in *Hills v. Gautreaux,* 96 S. Ct. 1538 (1976).

With respect to the General Assembly's failure in 1969 to reestablish IPS boundaries when it enacted Uni-Gov (or in any other way to alleviate the segregated conditions then existing), the Seventh Circuit had this to say:

> "It must be kept in mind that at this time both the General Assembly and the suburban school districts knew that this action was pending in district court. These "fail safe" measures (measures which repealed provisions for automatic extension of school city boundaries with the extension of civil city boundaries) indicated a legislative intent (reflecting local sentiments) that by one means or another the boundaries of IPS would not expand with those of the civil city. We say this because a court is entitled to draw reasonable and logical inferences from probable consequences of changes in the law and the evident purpose of such changes." Id. at A18-19.

What were the evident purposes of such changes? The court answered that question in its very next paragraph: to contribute to the separation of the races between IPS and the other school districts in Marion County. Said the court in that paragraph:

> "Because, in 1969, 95 percent of the blacks in Marion County live in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were "(A) substantial cause of interdistrict segregation." *Milliken v. Bradley* 418 U.S. 717, 745 (1974), and "(C) contributed to the separation of the races

> by . . . redrawing school district lines . . ." Id. at 755 (Stewart, U. concurring)."Id. at A19.

See *Wright v. City of Emporia,* 407 U.S. 451 (1972).

This evident reference to intent and purpose was given emphasis by the court's later remark that considerations of size, citizen participation and higher taxes (used in arguments against the 1959 consolidated school district plan),

> "Cannot justify legislation that has an obvious racial segregative impact." Id. at A19.

As Judge Tone correctly said in *Armstrong v. Brennan,* 539 F. 2d 625 (1976), at 634:

> "Purpose may of course be inferred from 'the totality of the relavent facts,' which may include discriminatory impact. *Washington v. Davis, supra,* — U.S. at —, 96 S. Ct. at 2049. As Mr. Justice Stevens said in his concurring opinion in that case, "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." Id. at —, 96 S. Ct. at 2054."

What actually happened in Indianapolis is that a black community was artificially confined to a single geographic area by state policy which at first encouraged and supported and, even in recent years, did not discourage local customs and practices which brought about and still are largely responsible for the segregation and separation of the races in IPS and between IPS and the surrounding school systems and their residential areas. It would be closing one's eyes and mind to reality not to conclude that this condition was the result of intention and purpose. The District Court and the Seventh Circuit, it is submitted, correctly perceived that reality.

C. Answers to specific points raised by various appellants and petitioners.

The Township of Perry emphasized on page 10 of its jurisdictional statement that it has always operated a unitary system and has not committed racially discriminatory acts. That is not relevant. The State of Indiana is responsible for education in the State, as shown by Judge Dillin in his *Indianapolis II* opinion. It is the state's intradistrict and interdistrict violations that give rise to an interdistrict violation and the need for an interdistrict remedy.

The Metropolitan School Districts of Lawrence, Warren, Wayne, and Decatur, and the Franklin Township School Corporation contend on page 24 of their jurisdictional statement that the decision below would "drastically limit the states' ability to accomplish civil reform." That is not so. This case involves a situation in which a state has been a substantial and purposeful cause of racial discrimination within and between school districts and which, rather than alleviating the situation, has passed legislation that makes the problem more difficult of solution.

The same districts contend on page 27 of their jurisdictional statement that the decree below will have a vast effect on their operations. However, under Indiana law, the IPS must pay for the cost of the transferred students. The record contains a yet undisputed finding by the district court that ample facilities exist in each affected school district to accommodate the too be transferred IPS students (IPS No. 76-520 p. A45).

Petitioners Bowen, Sendak, Negley, and the Indiana State Board of Education contend on page 23 of their petition for writ of certiorari that the Seventh Circuit

erred in suggesting that the District Court monitor its decree, perhaps on a yearly basis. A mere suggestion could hardly constitute reversible error. More important, the obvious purpose of the suggestion was to make it easier for the district court to reduce the number of pupils transferred if the Seventh Circuit's hopes were fulfilled that segregation and discrimination would be completely eradicated in the future. Surely it would not be erroneous to reduce the number of pupils transferred if the transfers became no longer necessary to effectuate a remedy.

Finally, IPS agrees that a limited interdistrict remedy is appropriate in this case. They are now without standing to contest the method used by the court to provide the relief, that is eliminate the constitutional violation. IPS contested the need for the interdistrict relief at the trial and contested the finding of the District Court regarding interdistrict relief on appeal to the Circuit Court of Appeals. The reasons given by IPS for the requested review are not within the statutory grounds which authorize issuance of writs of certiorari. The remedy employed by the District Court is not unconstitutional is reasonable and is supported by the record, nor does the remedy employed conflict with any ruling of any Circuit Court, or a ruling precedent of this Court.

IV

CONCLUSION

Wherefore, appellees respectfully submit that the questions upon which this cause depend are so unsubstantial as not to need further argument and appellees respectfully move the Court to dismiss this appeal and not to grant a writ of certiorari or, in the alternative, to affirm the judgment entered in the cause by the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Counsel for Appellee

JOHN PRESTON WARD

CHARLES D. KELSO

IN THE

Supreme Court of the United States

October Term, 1976

Nos. 76-212, 76-458, 76-468, 76-515

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA,
Appellant,

No. 76-212

v.

DONNY BRURELL BUCKLEY, et al.,
Appellees.

THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA, et al.,
Appellants,

No. 76-458

v.

DONNY BRURELL BUCKLEY, et al.,
Appellees.

THE METROPOLITAN SCHOOL DISTRICTS OF LAWRENCE, WARREN and WAYNE TOWNSHIPS, MARION COUNTY, INDIANA; et al.,
Appellants-Petitioners,

No. 76-468

v.

DONNY BRURELL BUCKLEY, et al.,
Appellees-Respondents.

OTIS R. BOWEN, et al.,
Petitioners,

No. 76-515

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

ON APPEALS OR PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS APPEALS AND BRIEF IN OPPOSITION FOR RESPONDENT BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS

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OPINIONS BELOW.

The opinion of the Court of Appeals (Perry A1-A35)[1] and the opinion of the District Court (Perry A36-A50) are unreported. Earlier opinions of the Court of Appeals are reported at 474 F.2d 81 and 503 F.2d 68. Earlier opinions of the District Court are reported at 332 F.Supp. 655 and 368 F.Supp. 1191, 1223.

JURISDICTION.

IPS asserts that the jurisdiction invoked under 28 U.S.C. § 1254(2) by appellants in Nos. 76-212, 76-458 and 76-468 is lacking, for the reasons stated in the motion to dismiss, *infra*. Jurisdiction is properly invoked only under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2103.

QUESTIONS PRESENTED.

The questions presented in all four petitions for certiorari and jurisdictional statements may fairly be combined and summarized as follows:

Whether the lower courts erred in holding that the Uni-Gov legislation reorganizing municipal government in Marion County and contemporaneous legislation affecting the relation between school district and civil city boundaries, enacted while the issue of *de jure* segregation in

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[1] In this brief appellant in No. 76-212 is referred to as "Perry," appellants in No. 76-458 are referred to as "Speedway," appellants-petitioners in No. 76-468 are referred to as "Lawrence" and petitioners in No. 76-515 are referred to as "State." Appendices are referenced by the appropriate name with the appendix page number. The abbreviation "pet." refers to the body of the petition or jurisdictional statement, as the case may be. Appellee-Respondent Board of School Commissioners of the City of Indianapolis and its school corporation are sometimes referred to herein as "IPS."

IPS was pending in the District Court, and the location of new public housing projects solely within IPS, separately or in combination, substantially caused interdistrict segregation in Marion County schools warranting a cross-district remedy under the legal standards articulated by this Court in *Milliken v. Bradley*, 418 U.S. 717 (1974).

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The constitutional and statutory provisions involved are set out in the appendices to each of the respective petitions and jurisdictional statements.

STATEMENT OF THE CASE.

An accurate statement of the proceedings below is contained in the petition in No. 76-520 filed by the Board of School Commissioners of the City of Indianapolis.

Appellants in No. 76-458 are incorrect in stating that the Uni-Gov legislation was the only issue properly before the trial court (Speedway pet. 9); the Court of Appeals found otherwise (Perry A15, n. 8). Also, contrary to the assertion in No. 76-515 (State pet. 14), the lower court here did find that the location of housing projects by instrumentalities of the State of Indiana caused and perpetuated segregation of black pupils in IPS and that the actions of these agencies caused the suburban school districts to remain segregated (Perry A39).

The statements of Appellants in No. 76-458 that "neither petitioners nor the communities they serve have ever been a part of IPS or the City of Indianapolis" (Speedway pet. 5) and that Speedway and Beech Grove "were thus unaffected by Uni-Gov in their status as separate municipal corporations" (Speedway pet. 6) are inaccurate and mis-

leading by omission of certain material facts. True, the Uni-Gov statute defines Speedway and Beech Grove as "excluded cities," they retain their own local governments providing certain municipal services, and their boundaries coincide with Appellants' school corporation boundaries. But as the Court of Appeals correctly found:

> "... Nonetheless, Uni-Gov has significant powers even in the excluded cities. It is in charge of air pollution regulation, building code enforcement, and municipal planning and thoroughfare control. Moreover, the citizens of the excluded cities vote in Uni-Gov elections." (Perry A10).

The District Court characterized citizens of Beech Grove and Speedway as having a "dual status." (Perry A38, n. 1)[2]

Other factual inaccuracies exist in the petitions which are not pertinent to the issues presented. The most signifi-

[2] The Uni-Gov statute provides additional evidence of such dual status, of which the lower courts could have taken judicial notice. For example, the Mayor of Indianapolis is the chief executive officer and the Indianapolis City-County Council is the legislative body of Marion County, which includes all the territory of the "excluded cities." I.C. 18-4-4-7; 18-4-4-4. Each of the six statutory departments of the City of Indianapolis, the directors of which are appointed by the Mayor, exercises significant functions or taxing authority over the entire county. In addition to those mentioned by the Court of Appeals, the Department of Administration (I.C. 18-4-7) controls purchasing, personnel and legal services for the county; the Department of Public Works (I.C. 18-4-9) has county-wide responsibility for drainage and flood control; the Department of Public Safety includes a county-wide civil defense division (I.C. 18-4-12-52) and the Department of Parks and Recreation (I.C. 18-4-13) administers a county-wide park system for which all county residents are taxed. All these services are substantially the same for the residents of Speedway and Beech Grove as for the residents of Indianapolis in the other suburban school corporations.

cant finding by the District Court relevant to the issues presented is as follows:

> "When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with [sic] IPS.
>
> The Court finds that the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited interdistrict remedy within all of Marion County, Indiana as hereafter described." (Perry A41).

The Court of Appeals, in affirming the District Judge, stated as follows:

> "Although Uni-Gov was a neutral piece of legislation on its face with its main purpose to efficiently restructure civil government within Marion County, it cannot be analyzed in isolation if its impact on school district boundaries is to be clearly perceived. Rather it must be considered in conjunction with the two other acts adopted in 1969.
>
> For some time Mayor Lugar had expressed his desire to embark on a more aggressive annexation program in order to bring a greater part of the urbanized area under the city's control. The concept of Uni-Gov was promoted as a more viable alternative to lengthy annexation litigation. The suburban school corporations and their legislative representatives were obviously aware that if Uni-Gov did not pass and the civil city was forced to embark on a more aggressive annexation program as a last resort to reorganizing governmental services, IPS boundaries would automatically extend with the civil city boundaries under the 1961 Annexation Act. In order to avoid this undesired result Chapter 52, 1969 Acts was enacted six-

teen days before Uni-Gov was adopted. This act repealed the provision in the 1961 Act which provided for automatic extension of school city boundaries with the extension of civil city boundaries. Chapter 239, 1969 Acts was also adopted, limiting remonstrances against municipal annexations to a few, simple, fairly objective grounds.

> *It must be kept in mind that at this time both the General Assembly and the suburban school districts knew that this action was pending in district court. These 'fail safe' measures indicated a legislative intent (reflecting local sentiments) that by one means or another the boundaries of IPS would not expand with those of the civil city. We say this because a court is entitled to draw reasonable and logical inferences from probable consequences of changes in the law and the evident purpose of such changes."* (Emphasis added.) (Perry A17-A19).

From these facts the Court of Appeals was convinced that "the essential findings for an interdistrict remedy found lacking in *Milliken* are supplied by the record in the instant case." (Perry A20). It concluded:

> ". . . Uni-Gov and its companion 1969 legislation were '[A] substantial cause of interdistrict segregation,' *Milliken v. Bradley,* 418 U.S. 717, 745 (1974), and '[C]ontributed to the separation of the races by . . . redrawing school district lines. . . .' *Id.* at 755 (Stewart, J., concurring)." (Perry A19)

MOTION TO DISMISS APPEALS.

Appellants in Nos. 76-212, 76-458 and 76-468 seek to appeal the decision of the Court of Appeals to this Court under 28 U.S.C. § 1254(2), which provides in part that cases may be reviewed "by appeal by a party relying on a state statute held by a court of appeals to be invalid

as repugnant to the Constitution . . ." Appellants contend that the Court of Appeals held invalid as applied to them the Indiana statutes set forth in Perry Appendix D (A53-A82). But Appellants fail to point to any language in either the decision of the District Court or the Court of Appeals in which any of these statutes was held unconstitutional and inapplicable to Appellants or any other party, person or entity.

The judgment of the District Court, as affirmed (Perry A47-A50 and A51), rather than the posing of questions in the initial opinion of the District Court (Perry pet. 5), determines whether the Court held a statute unconstitutional. That judgment simply ordered transfers of black students from IPS to Appellant school districts, and was grounded upon the conclusion of the courts below that the legislation in question, considered in combination and together with the other relevant facts of the case previously established in earlier decisions, constituted state action which sufficiently caused interdistrict segregation under the applicable legal standard of *Milliken v. Bradley,* 418 U.S. 717 (1974), to warrant a remedy crossing school district lines. As the Court of Appeals stated (Perry A16, n. 8), the District Court considered

> ". . . official conduct which arguably bears a historical relationship to the failure to expand the IPS boundaries to match those of Uni-Gov, which includes the failure to change IPS boundaries during the 1959-1962 Indiana school reorganization program and the failure to locate any public housing outside the IPS boundaries. On the intervening plaintiffs' theory of the case which the district court adopted, this course of conduct was a part of a pattern, of which Uni-Gov was also a part."

Milliken does not require a holding that state statutes are unconstitutional as a prerequisite to state action

causing interdistrict segregation and thus justifying an interdistrict remedy. As Mr. Justice Stewart stated, once the initial equal protection violation has been established the question of scope of the remedy concerns "the appropriate exercise of federal equity jurisdiction." 418 U.S. at 753 (Stewart, J., concurring). Mere reliance by an appellant upon a state statute as barring the relief sought by the plaintiff and the rejection of such defense by the Court of Appeals does not suffice to establish a constitutional ruling below appealable under § 1254(2). For example, in *Bradford Electric Light Co. v. Clapper,* 284 U.S. 221 (1931), the appellants relied on a state workmen's compensation law as barring the plaintiff's negligence action against his employer. The Court of Appeals had rejected appellant's contention on the ground that the public policy of the state of injury was contrary to the statutory bar, and this Court dismissed the appeal.

Even if the decisions below are construed as based upon the statutes alone, the courts did not rule any of the statutes invalid either on their face or as applied. The Court's judgment does not, directly or indirectly, require any of the Appellants or any other state officials to take action or to refrain from taking action in conflict with their duties and responsibilities under any of the statutes. I.C. 20-3-14, as amended by Chapter 52 of the 1969 Acts, continues in effect as to any future revision of school district boundaries in Marion County. The Uni-Gov Act, I.C. 18-4 (Acts 1969, Ch. 173) has not been found unconstitutional as to any part of its reorganization of civil government in Marion County, nor does the judgment of the Court consolidate Appellants into a single school district in disregard of I.C. 18-4-3-14, as would be the case if such statute were nullified by a declaration of unconstitutionality. The 1969 annexation law, I.C. 18-5-10-19 et seq. (Acts 1969,

Ch. 293) has not been found unconstitutional or inapplicable with respect to any unit of local government. On the contrary, since the courts found that legislative action caused segregation among school districts, the judgment granted affirmative relief in regard to school assignments in order to achieve relief from *de jure* segregation in schools by means which would have been available had not the legislation reinforced existing segregation and inhibited affirmative relief.

It follows that this case is not analogous to those cases relied on by Appellants as sustaining this Court's jurisdiction under § 1254(2), where the lower courts had found it necessary to enjoin or declare a statute unconstitutional in order to prohibit certain actions which the statute expressly permitted or had been applied to permit. For example, in *Dutton v. Evans,* 400 U.S. 74, 78 (1970), the Court of Appeals had set aside appellee's murder conviction by holding a state statute, interpreted to make admissible in evidence a post-conspiracy hearsay statement of a co-conspirator as an admission against the defendant, violated the Confrontation Clause of the Sixth Amendment. In *United Gas Pipe Line Co. v. Ideal Cement Co.,* 369 U.S. 134 (1962), appellant sought reimbursement for payment of a local tax on the sale of natural gas pursuant to a statute which the Court of Appeals held violative of the Commerce Clause. Likewise in *Detroit v. Murray Corp.,* 355 U.S. 489 (1958), the appellant city sought to assess property taxes against a government subcontractor under a state statute which the lower court held infringed upon the United States' immunity from state taxation. And in *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66, 70 (1954), appellant's suit for personal injuries in reliance on the Louisiana "direct action" statute had been dismissed by the lower courts on the ground that

the statute violated the Due Process Clause of the Fourteenth Amendment as applied to an insurance policy written and delivered outside the state.[3]

In the present case none of the Appellants has taken any action in reliance upon provisions of the state statutes in question which is prohibited by the decision of the Court of Appeals. None is required to take any action which any of the statutes would prevent. Appellants continue to operate their schools within their geographical boundaries established under the Marion County school reorganization plan, until and unless such boundaries are changed pursuant to the procedures of the 1961 Annexation Act, Acts 1961, Ch. 186, as amended (I.C. 20-3-14).

For these reasons appellee IPS moves the Court to dismiss the appeals in Nos. 76-212, 76-458 and 76-468 for lack of jurisdiction, and to consider the jurisdictional statements therein as petitions for writs of certiorari, pursuant to 28 U.S.C. § 2103 and Rule 19 of the Rules of this Court.

ARGUMENT.

Introduction.

IPS has filed a separate petition for writ of certiorari, asking this Court to review the judgment of the District Court as affirmed by the Court of Appeals, which has been docketed as No. 76-520, and which IPS believes presents issues of general significance and national importance regarding the interpretation and applicability of the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 et seq., the proper procedure to be followed

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[3] In the additional cases cited in Lawrence pet. 3 this Court dismissed the appeals under 28 U.S.C. § 1254(2) and granted certiorari pursuant to 28 U.S.C. § 2103.

by a district court in the exercise of its equitable powers to formulate a remedy for desegregation of a large urban school system, and the propriety of a court-ordered plan which simply reassigns black students to predominantly white suburban school corporations. The petitions in Nos. 76-212, 76-458, 76-468 and 76-515, however, ask this Court only to determine whether the lower courts correctly applied the legal principles articulated in *Milliken v. Bradley,* 418 U.S. 717 (1974), to the unique facts surrounding the organization and operation of school districts in Marion County, Indiana. For the reasons stated herein, IPS believes that the issues presented by those petitions do not meet the criteria of Rule 19 for review here, and accordingly that certiorari should be denied in each of such cases.

I. The issues presented are essentially factual and evidentiary, challenging concurrent findings and conclusions of two lower courts.

The petitions in Nos. 76-212, 76-458, 76-468 and 76-515 all attempt to challenge factual determinations that the purpose and effect of the 1969 Indiana legislation was to produce a significant racial impact of interdistrict segregation by preventing the expansion of the boundaries of IPS with those of the civil city. Such issues are merely factual ones and do not involve constitutional or other legal principles having general public importance, since they relate only to the sufficiency of the evidence.

Review by this Court is generally confined to matters of law shown by the record. The Court will not pass upon the sufficiency of the evidence or enter into a consideration of assigned errors below in dealing with matters of fact in the absence of glaring error, but rather the determina-

tions of fact below are taken as conclusive in most circumstances. *Besser Mfg. Co. v. United States,* 343 U.S. 444, 448 (1952).

The application of this rule is even clearer where there are concurrent findings of fact by two courts below. The Court will not undertake to review concurrent findings of fact by the District Court and Court of Appeals in the absence of a very obvious and exceptional showing of error. Such findings will ordinarily be accepted by the Court without reexamination of the evidence. *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.,* 336 U.S. 271, 275 (1948); *Allen v. Trust Co. of Ga.,* 326 U.S. 630, 636 (1946); *Anderson v. Abbott,* 321 U.S. 349, 356 (1944); *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.,* 321 U.S. 275, 278 (1944).

The "two court" rule applies even when matters of fact are only impliedly approved by the Court of Appeals. *Graham v. Brotherhood of Locomotive Firemen & Enginemen,* 338 U.S. 232, 235 (1949). Here the Court of Appeals found that the record supported a limited interdistrict remedy under the *Milliken* criteria as further applied in *Evans v. Buchanan,* 393 F.Supp. 428, 438-446 (D.Del.1975), affirmed, 46 L.Ed.2d 293 (1975) (Perry A22). The Court should not grant certiorari when the scope of its review would preclude consideration of petitioners' contentions that the evidence in the record does not support the factual conclusions of the District Court and Court of Appeals (Perry pet. 19, Speedway pet. 17, Lawrence pet. 29-30, State pet. 20).

II. The petitions for certiorari fail to give accurate information regarding the record and the essential facts upon which the opinions below were based.

In No. 76-468 petitioner alleges that the District Court refused to make a finding of fact that, but for events chargeable to the State, IPS would have expanded to the Marion County line (Lawrence pet. 30). But the District Court concluded:

> "... However, the General Assembly of Indiana, with its members elected on a state-wide basis, was not, or should not have been, subservient to local pressures, and undoubtedly could have legislated a county-wide school system for Marion County as easily as it legislated a county-wide civil government. . . ." (Perry A40).

This example illustrates that petitioners have failed to give accurate information regarding the record upon which this Court can base a decision.

Similarly, the petitioners, in stating that the decision below predicated a constitutional violation solely on the racial impact of statutes adopted and governmental actions taken without a racially discriminatory purpose, have ignored the express language of the Court of Appeals decision and the pertinent facts found below upon which the decision rests. The Court of Appeals expressly found that the General Assembly and the suburban school districts knew this action was pending in District Court and that the statutory enactments indicated the legislative intent that the boundaries of IPS would not expand with those of the civil city (Perry A18). The Court thus found state action having the intent and purpose to perpetuate racial separation in the schools by freezing school district lines while simultaneously annexing petitioners' territory to the

civil city (Perry A19). Such action necessarily had the intended consequences of limiting the remedy which under *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), inevitably would follow from any finding of *de jure* segregation in IPS in the then pending litigation.[4] As the Court of Appeals observed:

> "There is no dispute that a school district may not contract its territory in order to avoid desegregation. *Cf. Wright v. Council of City of Emporia,* 407 U.S. 451 (1972). Conversely, a city should not be permitted to extend its boundaries in order to avoid desegregation." (Perry A21).

III. There is no conflict between the opinion below and decisions of this Court.

A. Washington v. Davis

Appellants-petitioners claim that the opinion below squarely conflicts with *Washington v. Davis,* 48 L.Ed.2d 597 (1976) (Lawrence pet. 19-24, Perry pet. 21, Speedway pet. 17, State pet. 20-21). This contention misinterprets *Washington* in several ways.

1. The Court in *Washington v. Davis* reaffirmed the long standing rule that a discriminatory racial purpose need not be express nor appear on the face of a statute. Thus, the Court stated:

> "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another . . ." 48 L.Ed.2d at 608-609.

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[4] In *Swann* the city and county school districts had been consolidated for nonracial purposes in 1961. 300 F.Supp. 1358, 1362 (W.D.N.C. 1969).

In his separate opinion in *Washington,* Justice Stevens stated:

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision making, and of mixed motivation. . . ." 48 L.Ed.2d at 615.

Contrary to the contention of petitioners, the courts below did not rely on disproportionate impact, standing alone, as the "sole touchstone" (*Id.* at 609) of the discriminatory action charged to the state which caused interdistrict segregation. The Court of Appeals merely applied the same legal standard to the interdistrict violation issue which it previously applied to the issue of whether *de jure* segregation existed in IPS, a legal standard which this Court has considered unworthy of review in this case. Thus, in its affirmance of the District Court's finding of constitutional violations by IPS in *Indianapolis I* the Court of Appeals rejected the argument that a finding of "purpose" in the sense of invidious motivation was required:

> "The appellants deny any conscious motivation on the part of their predecessors or themselves to foster, or even continue, segregation policies in the school system; however, in examining that which was in existence at the time of *Brown I* and that which transpired thereafter, the courts are not precluded from drawing the normal inference of intent from consciously consummated acts. Intent, in this sense, may or may not be consistent with expressed motivation." *United States v. Board of School Commissioners,* 474 F.2d 81, 84-85 (7 Cir. 1973), cert. denied 413 U.S. 920 (State A107).

The court recognized that "to show *de jure* segregation, rather than *de facto* segregation, the Government must show improper intent and causation," 474 F.2d at 85 (State A108), and held such showing established by decisions drawing school attendance districts within IPS:

> "The district court made detailed findings regarding a number of practices which it considered supported the ultimate finding of *de jure* segregation. Perhaps the most extensive finding related to gerrymandering of school attendance zones within the allegedly neutral framework of the neighborhood school system. In the Board's initial set of neighborhood boundary lines, the district court found,
>
> '[they] were drawn with knowledge of racial residential patterns and the housing discrimination underlying it. Not only did the Board not attempt to promote desegregation, but the boundary lines tended to cement in the segregated character of the elementary schools.' 332 F.Supp. at 666." 474 F.2d at 85-86 (State A109).

Similar actions by the Denver school board resulted in a finding of unconstitutional segregation in its Park Hill area schools, a finding affirmed by the Tenth Circuit as to which this Court denied certiorari while simultaneously holding such actions sufficient to create a presumption that imbalance in other schools resulted from "intentionally segregative actions" of the board. *Keyes v. School District No. 1,* 413 U.S. 189, 192, 195, 208 (1973). The conclusion of the trial court that Detroit schools were *de jure* segregated was, as this Court noted in *Milliken v. Bradley,* 418 U.S. 717, 725, grounded on board actions having the "natural, probable, foreseeable and actual effect" of creating and perpetuating school segregation within Detroit, a conclusion approved by this Court as consistent with

the *Keyes* standard, 418 U.S. at 738, note 18, and mandating "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools," 418 U.S. at 753. In *Washington* this Court again reaffirmed the *Keyes* test that "the essential element of de jure segregation . . . 'is purpose *or* intent to segregate,' " 48 L.Ed.2d at 608 (Emphasis added).

This standard was applied to mandate interdistrict desegregation, despite trial court findings that districts were neither created nor gerrymandered for the purpose of effecting segregation and absence of intradistrict *de jure* segregation, in *Haney v. Board of Education of Sevier County,* 410 F.2d 920, 924 (8 Cir. 1969), where the Court said:

> "Simply to say there was no intentional gerrymandering of district lines for racial reasons is not enough. As Mr. Justice Harlan once observed, '[T]he object or purpose of legislation is to be determined by its natural and reasonable effect whatever may have been the motives upon which legislators acted.' New York ex rel. Parke, Davis & Co. v. Roberts, 171 U.S. 658, 681 (1898) (dissenting opinion)...."

The *Haney* decision was cited by this Court as an example of a case where the remedy could properly transcend district lines. *Milliken v. Bradley,* 418 U.S. at 744.

The interedistrict violation illuminated by the lower courts here was premised on the factual finding that at the time Uni-Gov and its companion legislation were enacted, expanding the city to the county line while freezing IPS boundaries which encompassed 95% of the black population of the county, the legislature knew the Government was challenging IPS school segregation in federal court

and the likely consequences thereof (Perry A19).[5] The decision is thus simply an application of legal standards recently articulated by this Court in *Keyes* and *Milliken*. The Court of Appeals majority rightly saw no need to discuss *Washington*, which reaffirmed *Keyes* but was not concerned with school desegregation remedies. Judge Tone's apparent assumption (Perry A27, note 1 and accompanying text) that "racially discriminatory purpose" requires a finding of invidious animus as the principal motivating force of the challenged action and that "equal protection is denied *only*" when such a "purpose" exists is an erroneous analysis of the meaning of *Washington*.

2. Moreover, the Court in *Washington* recognized that disproportionate impact combined with the failure of state officials to acquire information necessary to the proper performance of their duties may be sufficient to satisfy the requirement of discriminatory intent or purpose:

> "A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community, Hill v. Texas, 316 U.S. 400, 404 (1942) . . ." 48 L.Ed.2d at 608.

The finding of the District Court and the Court of Appeals here that the General Assembly signaled its lack of concern with the whole problem by eliminating schools from consid-

[5] The argument of the State (State pet. 20) that this finding is "factually incorrect" misstates both the record and the issues before the Court. The lower courts did find "interdistrict segregation" in Marion County, and the legislation changed the procedures for drawing school district lines through local governmental action, if not the lines themselves. The principal issue was the nexus between the legislation and the interdistrict segregation.

eration under Uni-Gov is merely an application of *Hill v. Texas* as reaffirmed in *Washington v. Davis*.

3. Finally, decisions of this Court do not require a finding of intent to discriminate as a prerequisite to an interdistrict violation, once the initial constitutional violation necessitating a remedial school desegregation decree has been established. Judge Tone, in his dissent below, assumed that an interdistrict remedy depended upon the establishment of a racially discriminatory purpose independent of the original racially discriminatory purpose found within IPS. But the test of *Milliken v. Bradley* is rather a *causal* one:

> "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation *within one district* that produces a significant segregative effect in another district." (Emphasis added.) 418 U.S. at 744-745.

That the test is an alternative one of *either* a constitutional violation in which the affected governmental entities are implicated *or* a significant segregative effect resulting from unconstitutional conduct of other officials was expressly stated by this Court in *Hills v. Gautreaux*, 47 L.Ed.2d 792, 801, 802 note 12 (1976).

In *Milliken* all the Justices agreed that the requisite "purpose or intent" to maintain segregated schools was satisfied by the violations within Detroit, 418 U.S. at 738; *Id.* at 762 (Mr. Justice White, dissenting). The Court divided only on the majority's additional requirement that a finding of an interdistrict segregative effect is a prerequisite to a remedy crossing district lines. As in *Milliken*, the District Court here found the State legally responsible

for the operation of all public schools and consequently for segregative actions of IPS, 368 F.Supp. at 1199-1203 (State A43-52). The effect requirement is met here by the finding of the effect of Uni-Gov and related legislation, together with the effect of locating predictably black-occupied housing projects solely within IPS, upon perpetuation of irremediable *de jure* segregation within IPS. Moreover, in *Washington* the Court reaffirmed the holding in *Wright v. Council of City of Emporia,* 407 U.S. 451 (1972), that "the racial impact of a law, rather than its discriminatory purpose, is the critical factor" in "proper circumstances," i.e., interference with an effective remedy for unconstitutional segregation previously established. *Washington v. Davis,* 48 L.Ed.2d at 609-610. *Milliken, Wright* and this case, unlike *Washington,* all concern the permissible scope of a judicial remedy for previously established unconstitutional conduct. The only difference between *Wright* and this case is that the challenged action in *Wright* came after the entry of the remedial decree.

B. James v. Valtierra

Nor is there any conflict between the decision below and prior authority of this Court in relation to the finding predicating an interdistrict violation on the failure to execute cooperation agreements under 42 U.S.C. § 1415(7)(b)(i) and HUD guidelines, as asserted by petitioners in Nos. 76-468 and 76-515 (Lawrence pet. 26, State pet. 22). *James v. Valtierra,* 402 U.S. 137 (1971), involved the constitutional validity of a California referendum procedure, not the failure of city officials to act. The Court emphasized that the record in *James* did not support a claim that a law seemingly neutral on its face was in fact aimed at a racial minority. 402 U.S. at 141. The Court of Appeals found here, on the contrary, that "the Housing Authority had jurisdiction outside the IPS boundaries" and that

"[t]he record supports these findings [of the District Court] and *clearly shows* a 'purposeful, racially discriminatory use of state housing.' *Milliken v. Bradley,* 418 U.S. 717, 755 (1974) (Stewart, J. concurring)." (Perry A23). (Emphasis added).

IV. The facts of this case are peculiar and not likely to recur.

This case involves statutes peculiar to Marion County, Indiana in relation to the reorganization of its county and city government and the influence of that governmental reorganization upon the school districts in Marion County during the pendency of a federal desegregation case. The decisions below gave full consideration to the issue of the effect of those facts under the governing decisions of this court; review by this Court would involve only questions of evidence applied under familiar legal rules. Accordingly, the issues presented in the petitions are not sufficiently important to warrant this Court's attention since they involve issues of state law which are unique to this case.

Under prior precedent of this Court, legislation which is found to have the purpose and effect found by the court below is violative of the Constitution, and under *Milliken* a remedy can be implemented which affects separate school corporations when such facts are found. The appropriate factual findings were made below, and the law applied does not conflict with *Washington v. Davis* or other prior decisions of this Court. The application of this legal standard by the courts below does not involve a significant undecided federal constitutional question, the decision of which would have effect beyond the particular facts of this case, and therefore the questions presented by peti-

tioners do not warrant review by certiorari under Supreme Court Rule 19.

CONCLUSION.

For the reasons given, the appeals in Nos. 76-212, 76-458 and 76-468 should be dismissed, and the Court should deny certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered July 16, 1976 upon the grounds submitted in the jurisdictional statements and petitions in Nos. 76-212, 76-458, 76-468 and 76-515.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-212, 76-458, 76-468,
76-515, 76-520, 76-522

THE METROPOLITAN SCHOOL DISTRICT
OF PERRY TOWNSHIP,
MARION COUNTY, INDIANA,

Appellant,

vs.

DONNY BRURELL BUCKLEY, ET AL.

Appellees.

(Captions continued inside cover.)

BRIEF FOR RESPONDENT INDIANA STATE TEACHERS ASSOCIATION ON PETITIONS FOR WRITS OF CERTIORARI AND JURISDICTIONAL STATEMENTS

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THE SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; THE SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA,

Appellants,

vs.

DONNY BRURELL BUCKLEY, ET AL.

Appellees.

THE METROPOLITAN SCHOOL DISTRICTS OF LAWRENCE, WARREN and WAYNE TOWNSHIPS, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA,

Appellants,

vs.

DONNY BRURELL BUCKLEY, ET AL.

Appellees.

OTIS BOWEN, as Governor of the State of Indiana;
THEODORE L. SENDAK, as Attorney General of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body,

Petitioners,

vs.

UNITED STATES OF AMERICA, ET AL.

Respondents.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL.

Petitioners,

vs.

DONNY BRURELL BUCKLEY, ET AL.

Respondents.

THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS, INDIANA,

Petitioner,

vs.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.

Respondents.

IN THE

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OCTOBER TERM, 1976

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DONNY BRURELL BUCKLEY, ET AL.

Appellees.

BRIEF FOR RESPONDENT INDIANA STATE TEACHERS ASSOCIATION ON PETITIONS FOR WRITS OF CERTIORARI AND JURISDICTIONAL STATEMENTS

On August 8, 1975, the District Court below granted the Motion of the Indiana State Teachers Association to Intervene as a party plaintiff.

The Indiana State Teachers Association (I.S.T.A.) appeared in the Court of Appeals for the Seventh Circuit in the proceedings as to which review is now sought, but

neither prayed the Court of Appeals to affirm nor to reverse the District Court's judgments, and expressed no opinion as to the legal or factual merits of the judgments.

The I.S.T.A. neither supports nor opposes the Petitions for Writs of Certiorari and Jurisdictional Statements filed herein by other parties. However, the I.S.T.A. does intend to preserve its status as a party in these proceedings, should this honorable Court grant the Petitions or note probable jurisdiction.

RICHARD J. DARKO

NOVEMBER, 1976

Nos. 76-212, 76-458, 76-468,
76-515, 76-520 and 76-522

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, ET AL., APPELLANT

v.

DONNY BRURELL BUCKLEY, ET AL.

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-212

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, ET AL., APPELLANT

v.

DONNY BRURELL BUCKLEY, ET AL.*

ON APPEALS FROM AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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* Together with No. 76-458 (*The School Town of Speedway, et al.* v. *Donny Brurell Buckley, et al.*); No. 76-468 (*The Metropolitan School Districts of Lawrence, Warren and Wayne Townships, et al.* v. *Donny Brurell Buckley, et al.*); No. 76-515 (*Otis R. Bowen, Governor, et al.* v. *United States, et al.*); No. 76-520 (*The Board of School Commissioners of the City of Indianapolis, et al.* v. *Donny Brurell, et al.*); and No. 76-522 (*The Housing Authority of the City of Indianapolis, et al.* v. *Donny Brurell Buckley, et al.*).

OPINIONS BELOW

The opinion of the court of appeals (Perry App. A1-A35)[1] is reported at 541 F. 2d 1211. The opinion of the district court (Perry App. A36-A50) is reported at 419 F. Supp. 180. Prior opinions of the court of appeals are reported at 474 F. 2d 81 and 503 F. 2d 68. Prior opinions of the district court are reported at 332 F. Supp. 655 and 368 F. Supp. 1191.

JURISDICTION

The judgment of the court of appeals (Perry App. A51) was entered on July 16, 1976. The notice of appeal in No. 76-212 was filed on July 26, 1976, and the appeal was docketed on August 12, 1976. The notices of appeal in No. 76-458 were filed on July 26, 1976, and the appeal was docketed on September 30, 1976. The notices of appeal in No. 76-468 were filed on July 26, 1976, and the appeal was docketed and a petition for a writ of certiorari was filed on October 4, 1976. The petitions for a writ of certiorari in Nos. 76-515 and 76-250 were filed on October 13 and 14, 1976, respectively. The petition for a writ of certiorari in No. 76-522 was filed on October 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and (2) and 28 U.S.C. 2103. As we discuss at pages 9-11, *infra*, we believe this Court does not have jurisdiction of the appeals.

[1] "Perry App." refers to the appendix to the jurisdictional statement in No. 76-212.

QUESTIONS PRESENTED

1. Whether the scope and effects of racial discrimination in the Indianapolis public school system and suburban school systems require the mandatory reassignment of students between separate school districts in the metropolitan area.

2. Whether the remedy designed in this case eradicates the effects of racial discrimination in the operation of the schools.

STATEMENT

The United States commenced this school desegregation suit on May 31, 1968, against the Board of School Commissioners of the City of Indianapolis, Indiana (IPS), pursuant to Section 407 of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. 2000c-6. On the basis of stipulations by the parties, the district court promptly entered a preliminary injunction ordering specific measures to desegregate the public school faculties.

On August 18, 1971, the district court held that IPS was "operating a segregated school system wherein segregation was imposed and enforced by operation of law" (Bowen App. A163).[2] The court of appeals affirmed (*id.* at A102 to A117) and certiorari was denied (413 U.S. 920).

The district court's 1971 decision postponed a final decision on a remedy for the unlawful racial separation of students. The court observed that the per-

[2] "Bowen App." refers to the appendix to the petition for writ of certiorari in No. 76-515.

centage of black students within IPS was approaching 40 and stated that a plan balancing the racial compositions of IPS schools "in the long haul * * * won't work" (Bowen App. A164) because "when the percentage of Negro pupils in a given school approaches 40, more or less, the white exodus becomes accelerated and irreversible" (*id.* at A160; see also n. 14, *infra*). Noting that the "tipping point" problem could be alleviated by consolidating IPS with surrounding school systems, the court directed the United States to join such additional defendants as might be necessary for litigation relating to the court's authority to order consolidation (*id.* at A165 to A167).

The United States joined all of the school corporations in Marion County (eight townships and two city corporations) as defendants but did not state a claim for relief against them (Perry App. A3). A few days later the district court permitted representatives of a class of black students to intervene as plaintiffs (*ibid.*). The intervening plaintiffs joined as defendants, and sought relief against, the Governor, Attorney General, Superintendent of Public Instruction and State Board of Education, and 19 school corporations.[3] The Indianapolis school board also joined as a defendant the Housing Authority of the City of Indianapolis (HACI), and by cross-com-

[3] The ten within Marion County that had already been joined on motion of the United States, plus nine districts in the adjoining counties of Boone, Hamilton, Hancock, Johnson, Morgan, and Hendricks.

plaint IPS charged HACI with establishing low-income housing projects in a manner that contributed to racial imbalance in the schools (*id.* at A38).

In 1973 the district court issued an opinion (Bowen App. A33 to A80) and a supplemental opinion (*id.* at A81 to A101) which concluded that relief promising a reasonable degree of permanent racial mixture in student assignments could not be accomplished within the present boundaries of IPS and that a final plan therefore must reassign students in other districts as well (*id.* at A40-A43). The court ruled that the State of Indiana shares the responsibility for racial separation in IPS and has a continuing duty to formulate a remedy (*id.* at A43-A52). The court therefore afforded the State an opportunity to select an appropriate, metropolitan-wide desegregation plan (*id.* at A56-A57). As interim relief, the court ordered that IPS rearrange its student assignments for the 1973-1974 school year so that each elementary school would have a minimum black enrollment of approximately 15 percent (*id.* at A66 to A67).[4]

In 1974 the court of appeals reversed the district court's orders to the extent that they required a remedy extending beyond Marion County or the boundaries established in 1969 for the Civil City of Indianapolis by 18 Indiana Stat. Ann. 18-4-4-1 *et*

[4] An interim order requiring the transfer of some black students to each of the added defendant school districts (*id.* at A65) was subsequently vacated by the district court (*id.* at A99).

seq. (1974) (the "Uni-Gov Act").[5] See Bowen App. A1 to A32. Insofar as the rulings pertained to a remedy within the boundaries of Uni-Gov, they were vacated and the case was remanded to "determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov" in accordance with *Milliken* v. *Bradley*, 418 U.S. 717 (Bowen App. A32). Finally, the court of appeals affirmed the interim relief ordered to be implemented within IPS. It stated, however, that the interim steps were insufficient to eliminate all of the effects of the racial discrimination within IPS (*id.* at A20), and it ordered the district court promptly to formulate a thoroughgoing plan (*id.* at A32). This Court denied certiorari (421 U.S. 929).[6]

On remand the district court entered an order that: (1) required the transfer of a sufficient number of black students in grades one to nine from IPS to the surrounding school districts to increase the

[5] Uni-Gov and contemporaneously enacted legislation limiting the annexation powers of IPS are set forth in part in Perry App. A66-A73 and are explained in detail by the court of appeals (*id.* at A9-A10, A15).

[6] Review had previously been sought and denied with respect to a number of other aspects of this litigation. See *School Town of Speedway* v. *Dillin*, certiorari denied, 407 U.S. 920; *Citizens of Indianapolis for Quality Schools* v. *United States*, certiorari denied, 410 U.S. 909; *Metropolitan School District of Lawrence Township* v. *Dillin*, certiorari denied, 412 U.S. 953; *Sendak* v. *Dillin*, stay denied, 412 U.S. 937.

proportion of black students in every school district in Marion County to no less than 15 percent (Perry App. A44-A45);[7] and (2) enjoined the location or establishment of additional low-income public housing projects within the borders of IPS (*id.* at A50).

A divided court of appeals affirmed. It agreed with the district court that two violations of the Equal Protection Clause of the Fourteenth Amendment supported the relief that had been ordered (Perry App. A2):

> The first was the failure of the state to extend the boundaries of * * * IPS when the municipal government of Indianapolis and other governmental units in Marion County, Indiana, were replaced by a consolidated county-wide government called Uni-Gov. The second violation was the confinement of all public housing projects (in which 98 percent of the residents are black) to areas within the boundaries of the City of Indianapolis.

The court of appeals thought that the adoption of Uni-Gov without expansion of the boundaries of the school system of Indianapolis amounted to racial discrimination because, but for the failure to expand the boundaries, an expanded school district would have contained more white children and it would have been possible for the district court to decrease further the concentration of black students

[7] Two school districts (Washington and Pike Townships) were exempted from the order because they already had enrollments approaching 15 percent black (Perry App. A44).

within IPS. The court conceded that there were legitimate reasons for not expanding the boundaries of the school system, among them "that a consolidated school district would be large, with consequent loss of citizen participation, and that it would increase taxes" (Perry App. A19). It concluded, however, that "[t]hese considerations, although apparently not racially motivated, cannot justify legislation that has an obvious racial segregative impact" (*ibid.*).

The court of appeals also agreed with the district court that placement of all public housing within the borders of IPS has "tended to cause and to perpetuate the segregation of black pupils in IPS territory" (Perry App. A23), that sites for public housing had been selected for racial reasons (*ibid.*), and that future construction of public housing within IPS "would only further aggravate the school segregation problem" (*id.* at A24). It therefore affirmed the injunction against such further construction.[8]

Judge Tone dissented (Perry App. A26-A35). In his view, the facts found by the district court did not establish that the decisions not to expand the school system boundaries and to place public housing within IPS were made for racially discriminatory reasons. He therefore would have held that there is no viola-

[8] The court stated that it agreed with the district court's broader finding that "the primary reason [why the black population of Marion County is concentrated within IPS has been] * * * discrimination in the availability of housing opportunities for blacks in the suburbs" (Perry App. A22). See Bowen App. A129 to A132 for a summary of the district court's conclusions in this regard.

tion of the Equal Protection Clause requiring inter-district reassignment of students.

On August 20, 1976, Mr. Justice Stevens stayed the orders with respect to inter-district transfers of students pending final disposition of the case by this Court.

DISCUSSION

1. Appeals have been filed in Nos. 76-212 and 76-458; an appeal has been joined with a petition for a writ of certiorari in No. 76-468. The question whether this Court has jurisdiction of these appeals depends upon whether the court of appeals has held a state statute unconstitutional. See 28 U.S.C. 1254 (2). The district court and the court of appeals indisputably thought that transfers of students are required between IPS and other school systems in Marion County, but it is not clear whether (a) the court of appeals held the Uni-Gov Act and related statutes unconstitutional because they failed to provide for a consolidated school district, or (b) it believed that the state legislature acted improperly in failing to enact a consolidation statute.

It seems most likely that the court of appeals adopted the latter position. It did not invalidate any provision of the Uni-Gov Act; it did not dissolve the unification of the civil governments that has been produced by Uni-Gov; it did not order school districts to be consolidated into a single entity (as it might have done if it thought that their exclusion from Uni-Gov was an unconstitutional provision of the

statute). The court simply ordered students to be transferred between school districts that will retain their separate identities. This is consistent with a holding that Uni-Gov is constitutional, and that the state legislature should have gone further and passed additional consolidation legislation.[9]

If, as we believe, this reading of the decision of the court of appeals is correct, the appeals should be dismissed for want of jurisdiction and the papers whereon the appeals have been taken should be treated as petitions for a writ of certiorari. 28 U.S.C. 2103. Because we believe that this case presents serious questions warranting review by this Court (see pages 11-20, *infra*), we believe that the petitions for a writ of certiorari should be granted. It might be appropriate, however, to set Nos. 76-212, 76-458, and 76-468 for oral argument and to postpone resolution of the question of jurisdiction to the hearing of the case on the merits, in light of the fact that

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[9] Even if the courts below held state laws unconstitutional, the case was properly tried before a single judge. When this issue was previously presented to this Court (see *Metropolitan School District of Lawrence Township* v. *Dillin*, certiorari denied, 412 U.S. 953) we pointed out that the statutes involved apply by their terms solely to the Indianapolis Public School District or to the City of Indianapolis. "[A] single judge, not a three-judge court, must hear the case where the statute or regulation is of only local import." *Board of Regents* v. *New Left Education Project*, 404 U.S. 541, 542. See also *Griffin* v. *County School Board*, 377 U.S. 218. Cf. *Delaware State Board of Education* v. *Evans*, appeals dismissed for want of jurisdiction, November 29, 1976 (Nos. 76-416, 76-474, 76-475, 76-499, 76-500, and 76-501).

this Court's jurisdiction turns upon the interpretation to be given to the opinion of the court of appeals.

2. The United States commenced this suit to challenge racial discrimination by and within IPS. It prevailed on its claims. Full relief has been delayed for several years, however, while the district court has considered an expanded, inter-district remedy that the United States did not seek. In our view this delay has been fruitless, because the evidence has not demonstrated any purposeful inter-district racial discrimination of the sort that would justify an inter-district mandatory reassignment of students.

Under *Milliken* v. *Bradley*, 418 U.S. 717, students may not be assigned from one district to another unless the districts involved in the student assignment decree also have been involved in acts of racial discrimination with inter-district effects. The district court and the court of appeals found in the State's failure to consolidate IPS with surrounding districts an inter-district violation with inter-district effects, but there is little support for this conclusion.

The court of appeals has not articulated why Indiana's decision not to expand the boundaries of IPS had either a racially discriminatory purpose or an inter-district effect. That decision simply left the *status quo* alone. The court of appeals conceded that the Uni-Gov Act is racially neutral on its face, that its only "flaw" is that it does not alter the *status quo*, and that the decision not to expand the size of the school system is supported by legitimate reasons (Perry App. A19). The majority of the court of

appeals appeared to believe, however, that a racially discriminatory purpose was established because the failure to expand IPS to the outer limits of the new Uni-Gov area meant that most black students would continue to attend schools within IPS, and because this might increase the proportion of black students within those schools to a point that would precipitate "white flight." In other words, the court thought that a State is required to take affirmative steps to prevent particular school districts from becoming "too black," and that failure to take these steps amounts to racial discrimination.[10]

If this reading of the court of appeals' decision is accurate, that decision is inconsistent with *Washington* v. *Davis*, No. 74-1492, decided June 7, 1976. The record does not contain direct evidence showing why the Indiana General Assembly chose not to consolidate

[10] Our brief in the court of appeals observed that the district court's resolution of this point places the burden of avoiding "tipping points" solely on black children and disparages the interest of black parents in voting for school board members who will direct the education of their children. Moreover, the court of appeals seemed to assume that there is something wrong with schools containing a majority of black children. We disagree. So long as school authorities operate "just schools" instead of one set of schools for blacks and another for whites, it matters not at all whether one particular school has more blacks than whites. The Fourteenth Amendment does not prefer black schools, white schools, or mixed schools—it demands, instead, a policy of neutrality under which neither merit nor demerit is assigned on the basis of color, except insofar as is necessary to eradicate the effects of distinctions previously made in the operation of the schools on this impermissible basis.

the school corporations in Marion County, and this is not a case in which acts have a racially disproportionate impact inexplicable in the absence of discriminatory intent. The failure to alter the *status quo* had no independent effect at all. The court of appeals' decision would be correct, therefore, only if a State has an affirmative duty to eliminate racially disproportionate school populations in different school districts. There is no such duty, however, unless the disproportion in the racial characteristics of the students of the different districts was caused by state action. *Spencer v. Kugler*, 404 U.S. 1027, affirming 326 F. Supp. 1235 (D.N.J.).[11] That has not been demonstrated here.

The only way in which the court of appeals suggested that the State and the school district may have produced racially disparate attendance patterns between districts is the establishment by petitioner HACI of all of the area's low-income public housing projects within the borders of IPS. The court of appeals found that this had been done with a discriminatory motive (Perry App. A23). Even if this were correct, which we doubt,[12] it would not fol-

[11] In *Spencer* the Court summarily affirmed a district court's holding that extreme racial imbalance, without more, does not authorize a court to revise neutrally established school district lines. See also *Milliken* v. *Bradley*, *supra*.

[12] Judge Tone, in dissent, stated that "[t]he record before us does not contain findings or evidence that the state acted with a racially discriminatory purpose in connection with Uni-Gov or public housing siting" (Perry App. A27, footnote omitted), and that the district court's judgment accordingly

low that reassigning students from one school district to another is a proper response to this form of racial discrimination. Congress has enacted laws to rectify residential discrimination. See 82 Stat. 81 *et seq.*, 42 U.S.C. 3601 *et seq.* Racial discrimination in housing should be attacked directly and eliminated as expeditiously as possible from our society. Violators of the fair housing laws should be subjected to penalties; if public housing has been built in a discriminatory manner, future sites can be selected in a way that ends the discrimination. But the effects of housing discrimination ought not to be the object of a "collateral attack" in a school case, unless the housing discrimination was undertaken with the purpose of affecting attendance patterns in the schools. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22-23.[13] There has been no finding in this case that the sites of public housing were selected for the purpose of affecting the racial compositions of the student populations of the schools. That being so, alleged discrimination in selection of sites of public housing would not provide justification for the reassignment of students from one school district to another.

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was incorrectly based on findings of racial effect alone. And see *Hills* v. *Gautreaux*, 425 U.S. 284, 305-306.

[13] On the other hand, if residential patterns had been influenced by the denial of access to particular schools on account of race, the existence of such patterns would not justify a failure to disestablish the invalid pattern of student assignments. Cf. *Swann, supra*, 402 U.S. at 20-21.

3. Even if there were evidence that the defendants in this case had engaged in intentional inter-district acts of racial discrimination with inter-district effects, it would not follow that the district court selected the proper remedy. The district court's remedy is designed to provide a degree of racial balance in all of the schools in Marion County. This relief has been prescribed without reference to the nature of the violations or their effects. Indeed, the district court did not even select school districts for inclusion in the plan on the basis of their participation (or lack of participation) in inter-district violations; it included or excluded them on the basis of the percentage of students who were black (see Perry App. A44).[14] The remedy thus is apparently designed to produce in the schools of Marion County a

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[14] The remedy was also selected, in substantial part, because the district court believed that "resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or less" (Perry App. A42), and that it was necessary to spread black students throughout Marion County in order to prevent schools from reaching this "tipping point" which the district court called "resegregation" (*ibid.*). We disagree with the implications of this characterization. In our view, the Constitution forbids only racial discrimination and its effects; it does not prohibit racial imbalance in the schools if that imbalance arises from causes other than official racial discrimination. The district court's apparent belief that racial imbalance, however caused, is a violation of the Constitution would abolish the requirement that the racial separation have been caused by acts of the State intended to affect the operation of the schools (rather than, for example, the acts of private individuals choosing where to live). See *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189; *Spencer* v. *Kugler, supra.*

racial mixture that the courts below believe is desirable, rather than to eradicate the effects of racial discrimination.

We have stated in our memorandum in *Delaware State Board of Education* v. *Evans*, appeals dismissed for want of jurisdiction, November 29, 1976 (No. 76-416), and *Austin Independent School District* v. *United States*, vacated and remanded, December 6, 1976 (No. 76-200), that this is not the proper way to formulate the remedy in a school desegregation case. We believe that the principles we have articulated in those cases apply here as well. The goal of a remedial order in a school desegregation case should be to put the school system and its students where they would have been but for the violations of the Constitution. The goal is, in other words, to eliminate "root and branch" the violations and all of their lingering effects. *Green* v. *County School Board*, 391 U.S. 430, 438. It is to eliminate those effects wherever they may be found, starting from the common understanding that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 203.

In our view, "desegregation" is nothing more or less than the elimination of racial discrimination and all of its lingering effects, "root and branch." The desegregation that courts are both empowered and obligated to accomplish is not the elimination of all racial separation without regard to its causes, whether *de jure* acts or *de facto* social processes.

The existence of schools predominantly attended by members of one race does not in itself amount to racial discrimination; if it did, there would be no meaning to the requirement of state action as a precondition to a violation of the Fourteenth Amendment. This is the critical line between racial discrimination and its effects, on the one hand, and mere difference of racial composition of attendance, on the other. See *Austin Independent School District* v. *United States, supra*, slip op. 4-5 (Powell, J., concurring).

The proper approach requires a court to seek to determine the consequences of the acts constituting the illegal discrimination and to eliminate their continuing effects. A conclusion that there has been some racial discrimination does not in itself support an inference that the discrimination caused all of the observed racial separation. See *Keyes* v. *School District No. 1, Denver, Colorado, supra*. It therefore does not support a judicial order that racial balance must be produced throughout the school system. See *Austin Independent School District, supra*. This follows directly from principles long accepted by this Court. "In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." *Brown* v. *Board of Education*, 349 U.S. 294, 300. The task of an equitable decree is to correct the condition that offends the Constitution. A finding of a violation does not set a court at large to produce results that never would have occurred if all constitutional provisions had been observed. The court

must instead order whatever steps are necessary for "disestablishing state-imposed segregation" (*Green*, *supra*, 391 U.S. at 439).

As the Court observed in *Swann*, *supra*, 402 U.S. at 15: "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." To this end there is broad equitable power "to remedy past wrongs" (*ibid.*). But the task is not to produce a result merely because the result may be considered desirable. "The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. * * * As with any equity case, the nature of the violation determines the scope of the remedy" (*id.* at 16). "[T]he remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, *supra*, 418 U.S. at 746. Cf. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764, 768-773.[15]

Our position is supported not only by this Court's cases but also by the judgment of Congress. In the Equal Educational Opportunities Act of 1974, 88 Stat. 516, 20 U.S.C. (Supp. V) 1712, Congress provided that "[i]n formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court * * * shall seek

[15] *Hills* v. *Gautreaux*, *supra*, is not to the contrary. In *Gautreaux* the Court specifically relied on the circumstance that "[t]he relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits" (425 U.S. at 299).

or impose only such remedies as are *essential to correct particular denials* of equal educational opportunity or equal protection of the laws" (emphasis added).

The district court's remedial plan cannot survive scrutiny under these principles. It is most unlikely that, but for any racial discrimination that may have had inter-district effects, every school district in Marion County would have had approximately 15 percent black students. The drawing of the IPA boundaries, and the failure to expand them, would not have had a significant effect upon the residential patterns of the County, and therefore would not have prevented racial mixture throughout the County. Although the selection of sites for public housing may have inhibited the distribution of black children throughout the district, there has been no showing here that a more nearly uniform scattering of public housing would have produced the almost completely uniform distribution of students required by the district court's order.[16] We therefore conclude that the

[16] The reasonably possible inter-district effects in this case might be summarized as follows. First, the school reorganization, annexation and Uni-Gov legislation froze long-established school district boundaries in Marion County and thus had no causal effect upon the disparate racial compositions of schools in Marion County. The most that might be said is that this legislation perpetuated racial disparities to the extent that the area's black teachers would have been assigned on a less disparate basis and black IPS students would have transferred voluntarily to suburban schools in a consolidated district. Second, the concentration of all low income public housing projects within IPS was a significant "influence to-

rectification of any possible inter-district acts of official racial discrimination found here (see notes 12 and 16, *supra*) does not call for mandatory inter-district reassignments of students of the magnitude prescribed by the courts below.[17]

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ward keeping black students confined within IPS, while at the same time keeping the suburban school systems virtually all-white" (Perry App. A46). Third, nearly all of the black students and teachers in the area live in IPS, concentrated and intentionally segregated into "black" schools. As this Court noted in *Keyes, supra,* 413 U.S. at 202, such discrimination has the "effect of earmarking schools according to their racial composition, and * * * may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing racial concentration within the schools." But none of these possibilities could have resulted in inter-district effects of the magnitude involved in the across-the-board inter-district relief ordered by the courts below.

[17] Arguments similar to those outlined here were presented to the court of appeals, and we proffered the suggestion that an order permitting voluntary transfers of black IPS students to the added defendant districts (in conjunction with the final desegregation of IPS schools) might be appropriate if some inter-district effects of discrimination were found The court responded by stating that the United States "condemns the only relief which can make its demand [for the complete elimination of illegal segregation in IPS schools] a reality" (Perry App. A25). That statement appears to be based on an assumption that full eradication of the effects of racial discrimination cannot be achieved in any school system 40% or more black because "white flight" would lead to "resegregation." The evidence shows that the probability of "white flight" from IPS has been greatly overstated. But, even so, as the Court noted in *Milliken, supra,* 418 U.S. at 747 n. 22, many of the cases in which this Court has approved system-wide desegregation plans have involved districts with

4. The jurisdictional statements and petitions for certiorari present numerous additional questions, some of which would not independently appear to require scrutiny.[18] We believe, however, that all of the questions presented in the many requests for review are related sufficiently closely to the principal issues on which we believe the court of appeals erred that the Court should consider all of them if it grants review of the judgment below.

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considerably higher black percentages, and the Court has never held that desegregation cannot be accomplished in a system with substantial numbers of black students.

[18] These questions include: (1) whether the court of appeals erred in "supplying" findings of fact not made by the district court (No. 76-468 J.S. 4); (2) whether the court of appeals erred in allowing the remedial area to include two municipalities that have not been fully merged into the Uni-Gov area (No. 76-458 J.S. 4); (3) whether the State shares responsibility for any illegal racial discrimination (No. 75-515 Pet. 4); (4) whether the district court improperly suggested that the remedy should be monitored yearly (*id.* at 23); (5) whether the remedial order fully complied with the Equal Educational Opportunities Act of 1974, discriminates against black students, or has educational or financial deficiencies (No. 76-520 Pet. 2-3); and whether HACI violated the rights of school students and, if so, whether it was proper for the district court to preclude further construction of public housing within the boundaries of IPS (No. 76-522 Pet. 2).

CONCLUSION

The Court should set Nos. 76-212, 76-458, and 76-468 for oral argument and postpone resolution of the question of jurisdiction to the hearing of the case on the merits. The Court should grant the petitions for a writ of certiorari in Nos. 76-515, 76-520, and 76-522.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

JANUARY 1977.

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